

Penn State Journal of Law & International Affairs

Volume 2 | Issue 2

November 2013

Symposium - The U.S.-Iranian Relationship and the Future of International Order

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ISSN: 2168-7951

Recommended Citation

Symposium - The U.S.-Iranian Relationship and the Future of International Order, 2 PENN. ST. J.L. & INT'L AFF. (2013).

Available at: <https://elibrary.law.psu.edu/jlia/vol2/iss2/12>

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State Journal of Law & International Affairs

2013

VOLUME 2 NO. 2

FOREWORD

The U.S.-Iranian relationship has perplexed and frustrated foreign policy decision makers, analysts, and academics for much of the last century. Saber rattling, allegations of oppressive and unfair sanctions, propaganda and covert action fill scholarly papers, newspaper articles and editorials, and academic gatherings on the dynamic between the two states.

On September 28, 2013 U.S. President Barack Obama placed a telephone call to the newly elected President of the Islamic Republic of Iran, Hassan Rouhani. This was the first direct conversation between the leaders of the two countries since the Iranian Revolution of 1979. The call lasted less than 20 minutes, yet its impact may challenge the current narrative and alter the nature of the relationship between the two countries—and in the process, reshape the contours of international order.

By focusing its symposium¹ and related issue on Iran, the *Penn State Journal of Law & International Affairs* seeks to reshape the public discussion on how the current U.S.-Iranian relationship will affect the international order in the future—and to do so in a way that challenges conventional debates over Iran's nuclear capabilities and aspirations. While the relationship between the two states encompasses a multitude of components and facets, the nuclear lens provides a launch point for examining that debate and the larger structural forces it implicates.

¹ The annual symposium of the *Penn State Journal of Law & International Affairs* was held on February 15, 2013 at Penn State's Dickinson School of Law and School of International Affairs. Video of the symposium is available at http://law.psu.edu/academics/journals/law_and_international_affairs/lectures_and_symposia.

In the time since the February 2013 symposium, the public discussion has evolved and an opportunity now exists to re-consider the U.S.-Iranian relationship. The essays in this issue do so without succumbing to the usual political frames and offer pragmatic suggestions rooted in an understanding of history, international law, and the demands of those in office.

In the opening essay, [Flynt Leverett](#) questions the sustainability of the U.S.'s current policy toward Iran, and its compatibility with the material and social realities facing many Middle Eastern publics. He urges U.S. officials to consider anew, and unencumbered by the axis of evil narrative, why Iran may want to pursue nuclear technology. In the conclusion of his essay, Leverett ponders whether recent rejections by the U.S. Congress and U.S. public of the use of force in Syria evince a more significant shift – and he calls on government officials to engage in a “substantial strategic revision” of the U.S.-Iranian relationship

In the companion essays that follow, [Daniel Joyner](#) and [Richard Butler](#) explore how current—often competing—interpretations of the Nuclear Nonproliferation Treaty (NPT) will impact its future viability. Joyner examines the history of Iran's compliance (or noncompliance) with the NPT and the related safeguard agreements by adopting the lens of the Western arguments and then inverting the lens to show the Iranian response. This device demonstrates how competing interpretations affect the efficacy of the NPT enforcement regime. In his essay on interpretative impact, Butler exhorts policymakers to return their focus to the historical purpose for the NPT: to create a world without nuclear weapons.

The companion essays from [Mary Ellen O'Connell](#) and [Reyam El Molla](#) and [James Houck](#) examine the appropriate role for the use of force doctrine in constraining state behavior, particularly with regard to the prospective use of force, by the United States or others, against Iranian nuclear targets. In his essay, Houck imagines a contemporary letter exchange between U.S. Secretary of State John Kerry and Iranian Foreign Minister Mohammad Javad Zarif, and explores the continuing influence of the *Caroline* doctrine on disputes over the justified use of force under international law. O'Connell and

El Molla challenge the assumption, implicit in many current discussions of Iran's nuclear program, that states have a right to use military force to end that program. Their article defends the primacy of the U.N. Charter and explores why an attack on Iranian facilities would violate international law, and do irreparable damage to the global legal order.

In the concluding essay, [Hillary Mann Leverett](#) posits that the U.S.'s greatest strategic challenge is to extricate its foreign policy from a quest for hegemonic dominance in the Middle East and other critical areas of the world. She argues that Iran represents an essential proof point for resetting American foreign policy on a more productive and realistic trajectory, and offers guidance on achieving such a reset.

The mission of the [Penn State Journal of Law & International Affairs](#) is to provide a forum for engaged conversations between scholars and policymakers to examine the most pressing and complex international problems and trends. The U.S.-Iranian relationship has occupied this category for much of the last quarter century. There now exists an opportunity to reconsider this label, and reframe the relationship. In his presentation at the recent October 2013 negotiations in Geneva, Iranian Foreign Minister, Mohammad Javad Zarif called for "an end to an unnecessary crisis and a start for new horizons."² The essays in this issue reflect that call and provide the insights needed to transform the U.S.-Iranian relationship from one of distrust and hyperbole to one of mutual respect and engaged exchange.

Amy C. Gaudion
Executive Editor

² Michael Gordon and Thomas Erdbrink, *Iran Presents Nuclear Plan to Big Powers*, N.Y. TIMES, October 16, 2013, at A4, <http://www.nytimes.com/2013/10/16/world/middleeast/in-new-nuclear-talks-technological-gains-by-iran-pose-challenges-to-the-west.html? r=0>.

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VOLUME 2 NO. 2

THE IRANIAN NUCLEAR ISSUE, THE END OF THE AMERICAN CENTURY, AND THE FUTURE OF INTERNATIONAL ORDER

*Flynt Leverett**

INTRODUCTION

This essay is grounded in two basic propositions. The first is that the United States and the Islamic Republic of Iran have emerged as the leading antagonists in a new Middle Eastern “Cold War” —a struggle over American primacy in the Middle East that shapes its geopolitics, even as the region is going through dramatic changes on multiple levels. The second is that how the U.S.-Iranian competition for influence plays out will have profound consequences not just for the Middle East, but also for the legal frameworks, rules-based regimes, and mechanisms of global governance that shape international order in the 21st century. This is especially true with

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regard to U.S.-Iranian disagreements over the Islamic Republic's nuclear activities.

Strategic competition between America and Iran and its implications for international order play out against a backdrop of the progressive diminution of U.S. leadership in world affairs—the end of what Andrew Bacevich has called “the short American century.”¹ Since Henry Luce proclaimed the American century's commencement in 1941, and especially since the Cold War's end, America's status as the preeminent power in the Middle East has been crucial to its global standing. At the same time, official American self-presentation and a considerable body of commentary and scholarship have linked U.S. primacy to the provision of global public goods; these include the transactional platforms and political and security arrangements needed to sustain economic openness and encourage continuing liberalization. The provision of such public goods has been bound up with the elaboration of rules-based regimes for key dimensions of international security (e.g., the Nuclear Non-Proliferation Treaty) and global commerce.

For decades, Washington has relied on perceptions of America as benevolent hegemon to legitimate first its post-World War II dominance over the non-communist world and then its post-Cold War primacy, in the Middle East and globally. However, U.S. administrations have also sought to manage the provision of public goods to ensure and maximize American power and influence—often in ways that contravene the image of America as benevolent hegemon.²

¹ Andrew Bacevich, *Life at the Dawn of the American Century*, in *THE SHORT AMERICAN CENTURY: A POSTMORTEM* 1-14 (Andrew Bacevich ed., 2012).

² See, e.g., DANIEL H. JOYNER, *INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY* 6-20 (2011) (discussing how, in its early advocacy for what would become the Nuclear Non-Proliferation Treaty, the United States was only concerned with forestalling the proliferation of nuclear weapons to preserve its strategic advantages as one of two nuclear superpowers; it was only in response to pressure from non-nuclear weapons states that America reluctantly agreed to include in the Treaty a commitment by nuclear weapons states to nuclear disarmament and recognition of all states' right to the peaceful use of nuclear technology). The relationship of these three core principles in the Treaty and the ramifications of this relationship for the Iranian nuclear issue is treated at greater

As the United States experiences relative decline, this approach becomes less and less sustainable.³ Its perpetuation is also

length below, and in other articles in this issue of the journal by Daniel Joyner, *Iran's Nuclear Program and International Law*, 2 PENN. ST. J. L. & INT'L AFF. 282 (2013), and Richard Butler, *NPT: A Pillar of Global Governance*, 2 PENN. ST. J. L. & INT'L AFF. 272. See also ANDREW BACEVICH, AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY 1-6, 32-54, 71-116 (2002) (discussing how American policymakers calculated that the promotion of economic globalization after the Cold War ended would ensure America's global primacy well into the 21st century); Robert Gilpin, *The Rise of American Hegemony*, in TWO HEGEMONIES: BRITAIN 1846-1914 AND THE UNITED STATES 1946-2001, 165-82 (Patrick Karl O'Brien & Armand Clesse eds., 2002), <https://www.mtholyoke.edu/acad/intrel/ipe/gilpin.htm> (discussing how, in a Cold War context, Washington leveraged its hegemonic position in post-World War II regimes for international trade and monetary relations to lock Western Europe and Japan into security-dependent alliances with the United States); ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 90 (1987) (discussing how the United States shifted from a more "benevolent" to a more "predatory" mode of economic hegemony in the 1960s and 1970s to manage its growing current account and fiscal deficits); ERIC HELLIENER, STATES AND THE REEMERGENCE OF GLOBAL FINANCE: FROM BRETTON WOODS TO THE 1990S (1996) (discussing how the promotion of financial liberalization in the 1960s, 1970s, and 1980s allowed the United States to leverage its unique structural advantages in international finance to ensure its continued leadership in international economic affairs even as its position in global manufacturing eroded); Flynt Leverett & Hillary Mann Leverett, *The Balance of Power, Public Goods, and the Lost Art of Grand Strategy: American Policy toward the Persian Gulf and Rising Asia in the 21st Century*, 1 PENN. ST. J.L. & INT'L AFF. 202, 210-11 (2012), <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1010&context=jlia> (discussing how America's commitment to secure the flow of Persian Gulf oil and gas to international markets has never had that much to do with America's own energy demand, being motivated to a much greater extent by Washington's interest in reinforcing its strategic influence in other important parts of the world where Persian Gulf hydrocarbons fill critical parts of the energy mix). Since September 11, 2001, the compatibility of aspects of America's "war on terror" with international law has been roundly challenged; likewise, the 2003 invasion and subsequent occupation of Iraq—justified by Washington as essential to Middle East and global security—is seen by most of the international community as illegal. The application of use of force doctrine to the Iranian nuclear case is also treated at greater length below, and in other articles in this issue of the journal by Mary Ellen O'Connell & Reyam El Molla, *The Prohibition on the Use of Force for Arms Control: The Case of Iran's Nuclear Program*, 2 PENN. ST. J. L. & INT'L AFF. 315 (2013) and James Houck, *Caroline Revisited: An Imagined Exchange Between John Kerry and Mohammad Javad Zarif*, 2 PENN. ST. J. L. & INT'L AFF. 293 (2013).

³ See Michael Mastanduno, *System Maker and Privilege Taker: U.S. Power and the International Political Economy*, 61 WORLD POL. 121 (2009), for more on this point.

prospectively dangerous for U.S. interests. Because the structure of contemporary international relations is shaped by social as well as material factors, the perceived legitimacy of a great power's actions matter greatly.⁴ As new powers rise, they can leverage Washington's hegemonic abuses to marshal resistance to America's strategic ambitions and delegitimize its primacy, thereby weakening its international position.⁵

Today, the U.S. posture toward the Islamic Republic is the most potent driver of hegemonic unilateralism in American foreign policy. Washington's determination to preserve its ambitions for dominance in the Middle East puts it on a collision course with the Islamic Republic, with its strong commitment to foreign policy independence. With a coterie of European hangers-on, the United States is focused on forcing the Islamic Republic to abandon its nuclear program, accept open-ended U.S. and Israeli military dominance in the Middle East, and acquiesce in its (Western-sponsored) transformation into a secular liberal state. On a regional level, this makes negotiating plausible solutions with Tehran, on the nuclear issue and other challenges, virtually impossible. It also puts America's Iran policy at odds with material and social reality in the

⁴ See Leverett & Mann Leverett, *supra* note 2, at 220-21, for a discussion of the importance of legitimacy for American primacy in the Middle East.

⁵ This is an underappreciated but increasingly salient aspect of what Robert Pape generically describes as "soft balancing"—the use of "nonmilitary tools" to "delay, complicate, or increase the costs" of a unipolar leader's hegemonic assertions that threaten other states' interests. In Pape's presentation, leveraging "the rules and procedures of important international organizations" and advancing "strict interpretations of neutrality"—and, I would add, of other aspects of international law—figure among the nonmilitary tools that can be deployed to constrain a unipole's initiatives. See Robert Pape, *Soft Balancing Against the United States*, 30 INT'L SEC. 7, 17, 36 (2005), http://belfercenter.ksg.harvard.edu/files/1019-is-30-1_final_02-pape.pdf. See also Martha Finnemore, *Legitimacy, Hypocrisy, and the Social Structure of Unipolarity: Why Being a Unipole Isn't All It's Cracked Up to Be*, 61 WORLD POL. 58 (2009), [http://www.polisci.wisc.edu/Uploads/Documents/IRC/Finnemore%20\(2009\).pdf](http://www.polisci.wisc.edu/Uploads/Documents/IRC/Finnemore%20(2009).pdf) (discussing how institutions, laws, and rules—even those originally championed by a unipolar power—have internal logics of their own that are hard for unipoles to control, and how "unrestrained hypocrisy" by a unipole undermines the legitimacy of its primacy); Shirley Scott, *International Law As Ideology: Theorizing the Relationship between International Law and International Politics*, 5 EUR. J. INT'L L. 1 (1994), <http://207.57.19.226/journal/Vol5/No3/art1.pdf>.

Middle East, contributing to the accelerating erosion of U.S. standing in one of the world's most vital areas.

On a global level, determination to compel Iran's surrender prompts ever more assiduous efforts by America and its partners to coerce other states into pressing Tehran. In the process, the United States violates basic principles of rules-based regimes for nuclear nonproliferation, trade, and other vital issues. Similarly, the lurking threat that Washington will launch yet another Middle Eastern war to cut Iran down to size—reflected in U.S. officials' regular reminders that "all options are on the table"—breaks international law regarding the use of force. This, too, is detached from strategic reality—as the Obama administration's self-inflicted debacle over its declared intention to use military force against the Syrian government following the use of chemical weapons in Syria on August 21, 2013 vividly demonstrated. The United Nations Security Council was not about to authorize such a venture—and, in the end, neither the Arab League, NATO, the British parliament, nor even the U.S. Congress was prepared to endorse it. This episode suggests that, as America's relative decline proceeds, the credibility of its threats to use force for blatantly hegemonic purposes is eroding as well—which means that continued resort to such threats is not just illegal, but self-damaging in strategic terms.

Relative decline challenges the United States to share the prerogatives of global governance, especially with rising powers in the global South. Such collaboration would enhance prospects for more effective global governance by aligning responsibility and capacity more accurately; it would also help sustain America's influence, even as its relative power declines. By contrast, abusively hegemonic assertions will provoke intensifying backlash from non-Western powers that will damage America's long-term position in international affairs. That is why the manner in which the U.S.-Iranian competition for influence in the Middle East plays out over the next few years—and how the United States conducts itself in this competition—will decisively affect both America's international standing and the dynamics of international order in the 21st century.

This essay, organized in four sections, looks at the prospective impact of U.S.-Iranian tensions over Iran's nuclear

activities on global governance. The first section examines the Iranian challenge to America's hegemonic ambitions in the Middle East and, more particularly, how the Iranian nuclear program fits into Tehran's counter-hegemonic strategy. The second section lays out how U.S.-Iranian differences over the Islamic Republic's nuclear activities reflect two very different conceptions of international order. The third and fourth sections then consider how these different conceptions of world order lead Washington, Tehran, and their respective supporters to different positions on what the Nuclear Non-Proliferation Treaty means for the Iranian case, and on what international law says about the prospective use of force against Iran's nuclear infrastructure.

I. IRAN, THE UNITED STATES, AND THE MIDDLE EAST'S SHIFTING BALANCE OF POWER

Since World War II, and especially since the end of the Cold War, the United States' status as the Middle East's preeminent power has been, as noted, crucial to its global primacy. America's unique capability to project conventional military power into the Middle East has enabled it to assume responsibility for the physical security of hydrocarbon flows from the Persian Gulf, on which the global economy depends, and to become the presumptive enforcer of order in the region. This muscle has given the United States extraordinary economic and political influence in the Middle East, which in turn has reinforced American dominance in other important parts of the world.

Today, the biggest challenges to the highly militarized political and security order that Washington has worked for decades to consolidate in the Middle East are posed by, associated with, or potentially exploitable by the Islamic Republic of Iran. Hillary Mann Leverett and I have developed a particular take on the U.S.-Iranian competition for influence in the region, which we develop in our book, *Going to Tehran: Why the United States Must Come to Terms with the Islamic Republic of Iran*.⁶ Our take is captured in two related

⁶ FLYNT LEVERETT & HILLARY MANN LEVERETT, *GOING TO TEHRAN: WHY THE UNITED STATES MUST COME TO TERMS WITH THE ISLAMIC REPUBLIC OF IRAN* (2013).

assessments: first, that the United States is, in relative terms, a declining power in the Middle East; and second, that the biggest beneficiary of America's regional decline is the Islamic Republic of Iran.⁷

Those unsure whether they agree with these assessments should compare the positions of the United States and the Islamic Republic in the Middle East on the eve of the 9/11 attacks, just over a decade ago, to their positions today. On the eve of 9/11, every Middle Eastern government was either reflexively pro-American (like Egypt and Turkey), in negotiation to become pro-American (like Qadhafi's Libya and Bashar al-Assad's Syria), or staunchly anti-Iranian (like Saddam Husayn's Iraq and Afghanistan under the Taliban). Today, because of elections, governments in Iraq, Lebanon, Libya, Palestine, Tunisia, and Turkey are no longer reflexively pro-American or anti-Iranian. All are now pursuing more independent foreign policies—which means they are less enthusiastic about strategic cooperation with the United States and more open to the Islamic Republic. The same could have been said for post-Mubarak Egypt, too, at least until a July 2013 military coup deposed its first democratically elected (and Islamist) government. To the extent that any post-coup Egyptian government is interested in maintaining even a modicum of public support, it cannot afford to be seen as wholly subordinate to the United States (or Israel). This will surely correlate with the pursuit of at least some measure of foreign policy independence. In August 2013, for example, Egypt aligned with Algeria, Iraq, and Lebanon to block an Arab League consensus to endorse U.S. military action against Syria over the Assad government's alleged use of chemical weapons.

As a result of these developments, the United States is in a profoundly weaker position and the Islamic Republic is in a significantly stronger position in the Middle East today than they were on the eve of 9/11. *Going to Tebran* argues that this shift in the Middle East's balance of power is happening both because of serious U.S. mistakes in the region and because of an Iranian national security strategy that has enabled Tehran to leverage U.S. mistakes to its very considerable advantage.

⁷ *Id.* at 1-11.

A. America's Counterproductive Quest for Middle Eastern Hegemony

When we refer to U.S. policy mistakes—including but by no means limited to the Iraq War—we do not identify them as idiosyncratic products of the George W. Bush administration. Rather, they stem from a much deeper source that cuts across Democratic and Republican administrations. We describe it as the United States giving in to a post-Cold War temptation to act as an imperial power in the Middle East. For the past twenty years, America has not been content to maintain its military primacy in the Middle East, defend its interests there, and legitimize its presence by soberly and effectively managing the regional balance of power. Instead, it has tried to remake the Middle East in accordance with American preferences, working to coerce political outcomes there with the aim of consolidating a highly militarized, pro-American regional order.

The United States did this by retaining military forces on the ground in Saudi Arabia and other Arab states after the first Gulf War (something it did not do, to any significant degree, during the Cold War, and which led directly to the emergence of Al-Qa'ida and the 9/11 attacks). It did this by leveling sanctions against Saddam Husayn's regime that led to the deaths of more than a million Iraqis, half of them children; by invading Afghanistan and Iraq after 9/11 and pursuing prolonged occupations in these countries that have killed hundreds of thousands of civilians; and by helping Israel consolidate a nearly absolute freedom of unilateral military initiative.⁸ As it has pursued these policies, the United States has also worked to isolate the Islamic Republic of Iran diplomatically, to press it economically, and to foment its collapse.⁹

Taken together, these policies constitute what *Going to Tebran* calls the imperial turn in U.S. Middle East policy. Pursued with little regard for on-the-ground realities, this imperial turn has proven not just quixotic but deeply damaging to American interests. Strategic failures in Afghanistan and Iraq have squandered human and material resources, while underscoring for the world, and especially for Middle

⁸ Leverett & Mann Leverett, *supra* note 2, at 216-20.

⁹ LEVERETT & MANN LEVERETT, *supra* note 6, at 279-84, 328-54.

Eastern publics, the limits of what American military can accomplish.¹⁰ More fundamentally, the imperial thrust of American policy has decimated the perceived legitimacy of American purposes in the Middle East for the vast majority of the people living there. Twenty years ago, perhaps even ten years ago, that fact might not have seemed so significant. But today, when Middle Eastern publics are becoming more politically engaged and when their opinions are mattering more than ever before, this is strategically devastating for the United States.

When he first ran for president in 2008, Barack Obama professed to understand this challenge; he pledged to change what he called the “mindset” that had gotten America into the strategic mistake of invading Iraq and, more broadly, to recast America’s Middle East policies. Instead, he has pursued the same sorts of policies—including on Iran—as his predecessors, policies that did significant damage to America’s strategic position. As a result, the Middle East’s balance of power has shifted even further away from the United States and its allies on Obama’s watch than at the end of George W. Bush’s presidency.¹¹

B. Iran’s Counter-Hegemonic Strategy.

On the other side of the U.S.-Iranian divide, the Islamic Republic has developed a counter-hegemonic national security strategy. This strategy has enabled the Islamic Republic not only to survive, but also to carve out enough strategic autonomy over the past 34 years to attain a high degree of political consolidation and to achieve a wide range of impressive developmental outcomes. By building a domestic order and pursuing a foreign policy that attracts Middle Eastern populations, it has also been able to take advantage of American mistakes to improve its own position in the Middle East.¹²

¹⁰ This point is also made in Stephen M. Walt, *The End of the American Era*, NAT’L INTEREST, Oct. 25, 2011, at 10-11.

¹¹ See Leverett & Mann Leverett, *supra* note 2, at 222-23. On Iran more specifically, also see LEVERETT & MANN LEVERETT, *supra* note 6, at 354-67.

¹² While many Western commentators argue that the Islamic Republic’s internal politics and illegitimacy will undermine it and “solve” America’s Iran

Going to Tehran draws on years of discussions with Iranian diplomats, national security officials, and politicians to explain how the world looks, strategically, from their point of view. Looking at a map, one sees that Iran shares land, littoral, and maritime borders with fifteen states.¹³ Virtually all have been hostile to the idea of an Islamic Republic in Iran. Several have been more than just hostile: the Islamic Republic's eastern neighbor—Afghanistan, under the Taliban—stormed the Iranian consulate in Mazar-e Sharif, killing Iranian diplomats. Its western neighbor—Iraq, under Saddam Husayn, with help from other Arab neighbors and America—invaded it, killing 300,000 Iranians. Today, many of those same Arab neighbors host thousands of U.S. troops and billions of dollars of the deadliest U.S. weapons systems, all poised to attack the Islamic Republic.¹⁴

To deal with these challenges, the Islamic Republic has worked to develop conventional and asymmetric defensive capabilities, but it has virtually no capacity to project military power offensively beyond its borders.¹⁵ The real key to Iran's foreign policy gains in the region has been what *Going to Tehran* calls its "soft power" strategy.¹⁶ One of the remarkable things about the shift in the Middle East's balance of power over the last decade or so, away from the United States and its allies and toward Iran and its allies, is that this shift has virtually nothing to do with the Islamic Republic's use of military force or economic coercion. The Islamic Republic has not

problem, the Islamic Republic is, in fact, supported by a sizable majority of Iranians living there and is not about to implode—a topic treated at greater length in this issue of the journal by Hillary Mann Leverett, [*How Precipitous a Decline? U.S.-Iranian Relations and the Transition from American Primacy*](#), 2 PENN. ST. J. L. & INT'L AFF. 328 (2013).

¹³ They are Afghanistan, Armenia, Azerbaijan, Bahrain, Iraq, Kazakhstan, Kuwait, Oman, Pakistan, Qatar, Russia, Saudi Arabia, Turkey, Turkmenistan, and the United Arab Emirates.

¹⁴ See LEVERETT & MANN LEVERETT, *supra* note 6, at 45-59, for a discussion on Iranian threat perceptions.

¹⁵ On the Islamic Republic's military capabilities, see *id.* at ch. 2.

¹⁶ Harvard's Joseph Nye defines soft power as the ability to get others to "want what you want," rather than coercing them to do what you want through hard military or economic power. See JOSEPH S. NYE, BOUND TO LEAD: THE FUTURE OF AMERICAN POWER 31 (1990). Also see LEVERETT & MANN LEVERETT, *supra* note 6, 90-101, for a discussion of Iran's soft power strategy.

invaded any country or sanctioned any state; its rise is much more about the growth of its soft power.

Recall my earlier point about the intensifying mobilization of Middle Eastern publics and the growing importance of those publics' opinions and attitudes in determining on-the-ground political outcomes. The Middle East's balance of power is progressively less defined by hard military capabilities, where the United States has clear advantages and the Islamic Republic is relatively deficient, and more and more defined in terms of who can appeal to regional publics, where the Islamic Republic has real advantages. In this context, Iran is pursuing a strategy that galvanizes regional publics' grievances against the United States and Israel and against their own unrepresentative regimes that cooperate, in various ways, with the United States and Israel. The Islamic Republic, in effect, aligns itself with those publics, and with public opinion itself, to constrain hostile, unrepresentative, and pro-Western neighboring governments from working with the United States to attack it. Over the years, Tehran has reinforced these aspects of its soft power strategy by picking political winners as its allies in key regional arenas—e.g., Hizballah in Lebanon, Shi'a Islamist and Kurdish parties in Iraq, and HAMAS in Palestine.¹⁷

Washington dismisses much of this as Iranian “support for terrorism.” But, with all due respect for the paramilitary capabilities of Iranian-supported groups resisting Israeli occupation, or resisting violent *jibadi* elements like Al-Qa'ida and the Taliban, the most interesting thing about these groups is that, when given the chance, they win elections. And they win for the right reasons—because they authentically represent unavoidable constituencies with real and legitimate grievances. When the United States refuses to deal with these groups by calling them terrorist organizations, it reduces even further its chances of constructively influencing regional developments, and opens up even more political space for Iran.

The soft power logic of Iranian strategy applies even in the case of Syria and the ongoing conflict there. It has become conventional wisdom in Washington that whatever soft power gains

¹⁷ LEVERETT & MANN LEVERETT, *supra* note 6, at 64-78.

the Islamic Republic had accrued in the Middle East over the past decade or so have been squandered as a result of the support that Tehran and its Hizballah allies have extended to Syrian President Bashar al-Assad and his government. But Iran and Hizballah have a very different assessment. They evaluate the Syrian conflict as the product of a U.S.- and Saudi-instigated campaign for regime change in Damascus, motivated by American and Saudi interest in undermining the Islamic Republic's security and weakening its regional position.¹⁸ Hizballah, for its part, identifies a "U.S.-Israeli-*takfeeri* project" that has been unleashed in Syria, aimed at changing Syria's strategic orientation in order to enfeeble Iran and Hizballah's capacity to resist American and Israeli hegemonic aspirations in the region.¹⁹ Iranian and Hizballah officials recognize that backing the Assad government has cost the Islamic Republic and Hizballah some of the enormous standing that they have built up with Sunni Arab publics—especially as Saudi Arabia and others on the Arab side of the Persian Gulf work assiduously to cast the Syrian conflict in sectarian terms. But in their calculations, as regional appreciation grows that the Syrian conflict is, at its core, about resistance, the sectarian issue will fade.²⁰ In the meantime, the Islamic Republic

¹⁸ See Kayhan Barzegar, *Rouhani, Iran Key to Political Solution in Syria*, AL-MONITOR (June 17, 2013), <http://www.al-monitor.com/pulse/originals/2013/06/iran-hassan-rouhani-geneva-syria.html>, for information about the Iranian policy toward Syria.

¹⁹ Discussions with Hizballah representatives in Beirut, Lebanon. (June 2013). See also Sayyid Hassan Nasrallah, Hizballah Secretary-General, Speech on Hizballah's Resistance and Liberation Day (May 25, 2013) and Sayyid Hassan Nasrallah, Hizballah Secretary-General, Speech on Hizballah's Injured Fighter Day (June 14, 2013), for discussions of the Syrian conflict. In a religious context, the Arabic word *takfeer* refers to the practice of declaring someone claiming to be Muslim as *kāfir*, pl, *kuffār*—an unbeliever masquerading as a pious person. It is a prominent aspect of the kind of *salafi* Islam championed by Muhammad Ibn 'Abd al-Wahhab, the 18th century preacher whose religious ideas continue to ground the form of Islam officially promulgated by Saudi Arabia, both at home and abroad. Over the last thirty years, *takfeeri* ideology—which is, among other things, anti-Shi'a in orientation—has been a powerful motivator for Saudi-supported *jihadi* movements (e.g., Afghan *mujahideen*, parts of whom evolved into Al-Qa'ida and the Taliban, and, more recently, *jihadi* groups in Iraq, Libya, and Syria, some of which have publicly affiliated themselves with Al-Qa'ida).

²⁰ For further discussion, see *Hal intahat julat Qusayr wa tudā'yāthā* [Has the Qusayr round ended and what are its implications?] (Interview with Flynt Leverett), MIN AD-DAKHIL (Al-Mayadeen), July 7, 2013,

retains vastly higher favorability ratings with Arab and other regional publics than the United States.²¹

C. Understanding Iran's Nuclear Program

How does Iran's nuclear program fit into its foreign policy and national security strategy? To answer this question, it is important to consider first what the program actually comprises.

In terms of reactor infrastructure, Iran currently operates the Tehran Research Reactor (TRR)²² that, among other things, produces medical isotopes for cancer patients, under international safeguards.²³ Additionally, Iran now operates a Russian-built power reactor at Bushehr, on the Persian Gulf, also under safeguards, and is building a heavy water reactor at Arak. Besides reactors, Iran is developing indigenous fuel cycle capabilities. In its main enrichment plant at Esfahan and in a newer site at Fordo, Iran is enriching uranium, again

http://www.almayadeen.net/ar/Programs/Episode/dmqS2FYuUkeiDqH3AP3_4_w/2013-07-07-اتجاهات داعي-والقصد في جولة اند-ثيت-هل. It is also notable that, while HAMAS declined to fight for the Assad government after the Syrian conflict broke out and relocated its external political leadership from Damascus, it has not called for Assad's removal. In discussions in Doha, Qatar in May 2013, senior HAMAS officials said that they continue to hold that a negotiated settlement between the Syrian government and the opposition is the only way to end the conflict—essentially the same position taken by Iran and Hizballah.

²¹ See Flynt Leverett & Hillary Mann Leverett, *Iran and the United States—What Really Matters to Middle Eastern Publics?*, HUFFINGTON POST, Mar. 6, 2013, http://www.huffingtonpost.com/flynt-and-hillary-mann-leverett/iran-and-the-united-state_b_2821860.html, for information on this point. See also SHIBLEY TELHAMI, *THE WORLD THROUGH ARAB EYES: ARAB PUBLIC OPINION AND THE RESHAPING OF THE MIDDLE EAST* 129-30, 134-35, 137-43 (2013).

²² America originally gave the TRR to the Shah—who openly stated his intention to develop nuclear weapons—in the 1960s. Initially, the TRR ran on uranium fuel enriched to weapons-grade levels. After the Iranian Revolution, the Islamic Republic reconfigured it to run on fuel enriched to just below 20 percent, greatly reducing the proliferation risks of its operation. LEVERETT & MANN LEVERETT, *supra* note 6, at 86-87.

²³ The TRR is located on the fringes of the University of Tehran campus in the middle of the city; one can see it from the conference room of the university's Faculty of World Studies, where Hillary Mann Leverett and I have given guest seminars.

under safeguards, to the 3-4 percent level needed to fuel power reactors and to the near-20 percent level required by the TRR.²⁴

Since the early 1990s, American and Israeli intelligence services have warned that Iran is three to five years away from acquiring nuclear weapons. Yet twenty years into this constantly resetting forecast, no intelligence agency has come remotely close to producing hard evidence that Iran is trying to fabricate nuclear weapons. Even at the near-20 percent level, Iran is below both the International Atomic Energy Agency's (IAEA) 20-percent threshold for highly enriched uranium and the 90-plus-percent level for bomb-grade material. The IAEA has, for years, consistently affirmed that there has been no diversion of nuclear material from Iran's nuclear facilities, and has never found evidence Iran is enriching anywhere close to weapons-grade levels. Indeed, American and Israeli intelligence services currently say that Iran is, at this point, not working to fabricate nuclear weapons.²⁵

Going to Tehran identifies two powerful reasons why the Islamic Republic is unlikely to build such weapons. First, there is strong consensus among Iranian political and policy elites that acquiring a relatively small nuclear arsenal would diminish, not enhance the Islamic Republic's security.²⁶ Second, beyond this strategic rationale, both Imam Khomeini, the Islamic Republic's "founding father" and its first Supreme Leader, and Ayatollah Khamenei, the current Leader, have declared that nuclear weapons violate Islamic law, that they are *haram*—forbidden by God.

One may discount this as mere talk, but there is an important precedent where the Islamic Republic also walked the walk on this issue. During the Iran-Iraq War in the 1980s, Iran was subjected for years to chemical attack—against civilian as well as military targets—while the United States (which was backing Saddam Husayn's war of aggression against the fledgling Islamic Republic) blocked the United Nations Security Council from taking any action on the matter. As the attacks continued, Iranian military commanders asked for

²⁴ LEVERETT & MANN LEVERETT, *supra* note 6, at 81-85.

²⁵ *Id.* at 85.

²⁶ *Id.* at 85-86.

Khomeini's authorization to use the infrastructure inherited from the Shah to mass produce chemical weapons agents and fabricate chemical weapons, so as to be capable of retaliating in kind against Iraqi chemical attacks. Khomeini said no, holding that chemical weapons were *haram* (forbidden by God) and that the Islamic Republic would not use them, even though it was being regularly subjected to chemical attack.

Khomeini and Khamenei have both said that nuclear weapons, like chemical weapons, violate God's law. In a system that legitimates itself in no small part on the basis of its perceived adherence to Islamic law, that is not a trivial thing.²⁷

So if the Iranian nuclear program is not a weapons program, what are its purposes? Three stand out. First, while a lot of Western commentary derides the suggestion that the program has an economic rationale, there are, in fact, real economic and technological benefits that Iran accrues from its nuclear activities. They allow Iranian scientists, engineers, and technicians to develop expertise (for example, in centrifuge technology) applicable beyond the nuclear arena and to establish new sectors (for example, producing medical isotopes) for the Iranian economy. Iran already exports electricity to Afghanistan, Iraq, Pakistan, and Turkey, and wants to expand such exports in the future. Developing nuclear energy for the purpose of power generation directly supports this ambition. It also prospectively allows the Islamic Republic to devote more of its oil to export or to value-adding processes like oil-based petrochemicals. Likewise, nuclear energy frees up natural gas for injection into aging oil fields and for cultivating petrochemicals and other gas-based industries.²⁸

Second, from a security perspective, the way that the program has developed suggests that it is partly aimed at giving the Islamic Republic some measure of what is often called a nuclear option by allowing Iranian scientists and engineers to develop at least some of the core competencies for fabricating nuclear weapons, but without actually building them. Policy elites across the Iranian political

²⁷ *Id.* at 87.

²⁸ *Id.* at 87-88.

spectrum acknowledge that perceptions the Islamic Republic is developing such a nuclear option have deterrent value even without overt weaponization. Furthermore, the nuclear program gives Tehran leverage to compel Washington to come to terms with it, making the nuclear issue an attractive point of entry for dealing with the United States and other major powers on larger strategic questions.²⁹

Third—and most importantly—the program’s main strategic purposes are political rather than military. The Islamic Republic is pursuing its nuclear rights in defiance of America and Israel—and that has powerful resonance not just at home but across the region. Some Arab leaders may not like the Iranian program, but polls of predominantly Sunni Arab populations show large majorities have been strongly supportive of Iran’s nuclear efforts. Some even show large majorities of Arabs thinking it would be a good thing if Iran acquired nuclear weapons.³⁰

And that brings us back to Iran’s soft power strategy. Through its narrative—not its drones or tanks or even its centrifuges, but its narrative—the Islamic Republic is using the political awakening of Middle Eastern publics to alter the very nature of power politics in the region. The Middle East’s balance of power is becoming, more and more, a balance of influence. The Islamic Republic is both encouraging and taking advantage of this transition to enhance its own regional standing.

II. ALTERNATIVE CONCEPTIONS OF INTERNATIONAL ORDER

The resulting shift in the Middle East’s balance of power—simultaneously distributional (affecting who has relative power) and essential (about the basis of power)—poses a high-stakes challenge for U.S. foreign policy. For its own interests, and on classic balance-of-power grounds, America needs strategic rapprochement with the Islamic Republic. But Washington’s longstanding determination to suppress the emergence of independent power centers in the Middle East continues to warp U.S. policy choices toward the Islamic

²⁹ *Id.* at 88, 90.

³⁰ *Id.* at 88-90. *See also* Leverett & Mann Leverett, *supra* note 21; TELHAMI, *supra* note 21, at 135-38.

Republic and the region more generally. It also warps the U.S. attitude toward global governance.

U.S.-Iranian tensions over the Islamic Republic's nuclear activities reflect two different ways of thinking about international order. One might be described as a positivistic, rules-focused approach. In this approach, substantive and procedural norms for international behavior are created by the consent of independent, sovereign states. Thus, international order is based very much on *lex lata*, what the law actually is, not *lex ferenda*, what the law (from one ideological view or another) should be. From a positivistic perspective, rules and norms, once created, are to be interpreted very narrowly, in terms of both how they are interpreted and who interprets them.

The alternative is a more policy-oriented—one might say results-oriented—approach. From this perspective, what matters are the policy goals and values that motivate the creation of particular rules and norms—not the rules and norms themselves, but the goals and values underlying them. In further contrast to the positivistic approach, the policy-oriented approach ascribes a special role in interpreting rules and norms to the most powerful states in the system—those states with the resources and willingness to act in order to enforce the rules.³¹

If one looks at who supports one of these approaches over the other, the positivistic approach is very much favored by non-Western states. States in what we used to call the Third World have sharply criticized “colonial” international law for having warped the positivist principle of consent as the basis for international legal rules and obligations. But, with a universalized respect for national self-determination, they have also embraced a positivist orientation to international law as an indispensable foundation for globalizing core legal principles of sovereign equality and non-interference in states’

³¹ See the following sources for more on the contrasts between these approaches: ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 67-86 (1999); Tai-Heng Cheng, *Making International Law Without Agreeing What It Is*, 10 WASH. U. GLOBAL STUD. L. REV. 1 (2011); and David Kleimann, *Positivism, the New Haven School, and the Use of Force in International Law*, 3 BSIS J. INT'L STUD. 26 (2006) (focusing on use of force questions).

internal affairs.³² From a non-Western perspective, it is only through this kind of positivism that international law, rules, and norms might actually constrain established powers as well as rising powers and the less powerful.

Correspondingly, the policy-oriented approach tends to be favored by Western powers—above all, by the United States. Its modern intellectual roots go back to the 1950s and 1960s and the so-called New Haven school of international law, forged by a network of scholars based largely at Yale Law School, the central figures in which were Myres McDougal and Harold Lasswell. Whatever their scholarly ambitions to reconstruct international legal methodology, the main policy-oriented goals of McDougal, Lasswell, and their *protégés* (as opposed to mere students, some of whom took very different policy positions) was to justify U.S. foreign policy in the Cold War context, especially regarding nuclear weapons, Third World intervention, and use-of-force questions.³³ Another prominent Yale

³² See Agreement (with exchange of notes) on trade and intercourse between Tibet Region of China and India (April 29, 1954), 299 United Nations Treaty Series 57 (1958); Scott, *supra* note 5, at 2-3; S. PRAKASH SINHA, NEW NATIONS AND THE LAW OF NATIONS (1967); RAM PRAKASH ANAND, NEW STATES AND INTERNATIONAL LAW (1972); RAM PRAKASH ANAND, INTERNATIONAL LAW AND DEVELOPING COUNTRIES: CONFRONTATION OR COOPERATION (1987); Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 79-82 (2003); Dai Bingguo, *Asia, China and International Law*, 11 CHINESE J. INT'L L. 1 (2012); Christopher Clapham, *Sovereignty and the Third World State*, 47 POL. STUD. 522, 522-29 (1999); James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184 (1998); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353 (1998); M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SINGAPORE Y.B. INT'L L. 19 (2006); Ram Prakash Anand, *Attitude of the Asian-African States toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55 (1966); S. Prakash Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law*, 14 INT'L & COMP. L.Q. 121 (1965); Steven Weber *et al.*, *A World Without the West*, NAT'L INT., Summer 2007, at 25-28; and *Background: Five principles of peaceful coexistence*, XINHUA, June 14, 2004, http://news.xinhuanet.com/english/2005-04/08/content_2803638.htm.

³³ For representative presentations drawn from a sizable bibliography, see the following: Myres McDougal, *Foreword* to ROGER H. HULL & JOHN C. NOVOGROD, *LAW AND VIETNAM* at vii-ix (1968); Myres McDougal, *Foreword* to JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* at vii, xi (1972); Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1958), *reprinted in* MYRES MCDUGAL ET AL.,

law professor and dean, Eugene Rostow (who became a leading neoconservative foreign policy intellectual in the 1970s, 1980s, and 1990s) also contributed to this agenda.³⁴ In the post-9/11 period, the policy-oriented approach continues to have high-profile advocates in the legal academy, encompassing neoconservative advocates of American unilateralism and preventive war on the right and liberal champions of humanitarian intervention and the “responsibility to protect” on the left.³⁵ Certainly, over the last half century, its logic has

STUDIES IN WORLD PUBLIC ORDER (1960); Myres McDougal & Harold Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1 (1959), reprinted in MCDUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER (1960); and W. Michael Reisman, *Deterrence and International Law*, 4 N.Y.L. SCH. J. INT’L & COMP. L. 339 (1983). For examples of contrary positions taken by international legal scholars trained at Yale during McDougal and Lasswell’s heyday, see the following: Richard Falk, *Casting the Spell: The New Haven School of Law*, 104 YALE L.J. 1991 (1995) (reviewing HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY (1992)); Richard Falk, *Toward A Legal Regime For Nuclear Weapons*, 28 MCGILL L.J. 519 (1983); Richard Falk, Lee Meyrowitz, & Jack Sanderson, *Nuclear Weapons and International Law*, INDIAN J. INT’L L. 541 (1980); Richard A. Falk, *International Law and the United States Role in the Vietnam War*, 75 YALE L.J. 1122 (1966); Burns H. Weston, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L. SCH. J. INT’L & COMP. L. 227 (1983); and Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 542 (1983).

³⁴ See, e.g., Eugene Rostow, *Is There a Legal Basis for Nuclear Deterrence Theory and Policy?*, in LAWYERS AND THE NUCLEAR DEBATE: PROCEEDINGS OF THE CANADIAN CONFERENCE ON NUCLEAR WEAPONS AND LAW 175 (1988); EUGENE ROSTOW, *TOWARD MANAGED PEACE: THE NATIONAL SECURITY INTERESTS OF THE UNITED STATES, 1759 TO THE PRESENT* (1995).

³⁵ On the neoconservative side, see, for example, Robert J. Delahunty & John Yoo, *Great Power Security*, 10 CHI. J. INT’L L. 35 (2009); Jack Goldsmith, *Fire When Ready*, FOR. POL’Y (March 19, 2012), http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready; Eric Posner, *Think Again: International Law*, FOR. POL’Y (Sept. 17, 2009), http://www.foreignpolicy.com/articles/2009/09/17/think_again_international_la; and John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004). On the liberal side, see, for example, Allen Buchanan & Robert Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT’L AFF. 1 (2004); Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOR. AFF., Jan.-Feb. 2004; Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283 (2004); Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT’L L. 619 (2005); Thomas Weiss, *R2P After 9/11 and the World Summit*, 24 WIS. INT’L L.J. 741 (2006); Anne-Marie Slaughter, *Was the Libyan Intervention Really an Intervention?*, ATLANTIC, Aug. 26, 2011,

been strongly reflected in the perspectives that U.S. administrations, Democratic and Republican, have brought to bear in legal analyses of foreign policy questions.

III. THE IRANIAN CASE AND THE NUCLEAR NONPROLIFERATION REGIME

Tensions between these divergent conceptions of world order condition U.S.-Iranian disagreements over the status of the Islamic Republic's nuclear activities under the international nuclear nonproliferation regime, which rests on the foundation of the Nuclear Non-Proliferation Treaty (NPT). The NPT, which opened for signature in 1968 and entered into force in 1970, is the international community's main vehicle for regulating nuclear energy-related technologies in both civil and military applications.³⁶ It is appropriately understood as a set of three interrelated commitments by parties, which are divided into two categories, nuclear-weapon states [hereinafter "weapons states"] and non-nuclear-weapon states [hereinafter "non-weapons states"].

- In Article II and Article III, non-weapons states—like Iran—commit not to build or acquire nuclear weapons.
- In Article VI, weapons states—the United States, Russia, Britain, France, and China—commit to good faith negotiations for nuclear disarmament.
- In Article IV and Article V, all agree that parties have an "inalienable right" to use nuclear technology for peaceful purposes "without discrimination"—and are obligated to

<http://www.theatlantic.com/international/archive/2011/08/was-the-libyan-intervention-really-an-intervention/244175/>; Anne-Marie Slaughter, *Intervention, Libya, and the Future of Sovereignty*, ATLANTIC, Sept. 4, 2011, <http://www.theatlantic.com/international/archive/2011/09/intervention-libya-and-the-future-of-sovereignty/244537/>; and Ivo Daalder & James Steinberg, *Preventive war, A useful tool*, L.A. TIMES, Dec. 4, 2005, at M3, <http://articles.latimes.com/2005/dec/04/opinion/op-preemptivewar4>.

³⁶ JOYNER, *supra* note 2, at 3, 20.

facilitate the exercise of that right, especially by non-weapon states.³⁷

There have long been strains between weapons states and non-weapons states over weapons states' poor compliance with their commitment to disarm. Today, though, these tensions are particularly acute over perceived tensions between NPT signatories' commitment to nonproliferation and their commitment to enabling the peaceful use of nuclear technology.

A. Reading (and Misreading) the NPT

The two alternative conceptions of international order outlined above give rise to very different perspectives on interpreting the NPT regarding this issue. One perspective—grounded in the positivistic model of international law and global governance—gives the Treaty's three core bargains equal standing. The other—grounded in the policy-oriented model—holds that non-weapons states' commitment to nonproliferation trumps those by weapons states to nuclear disarmament and by all to the peaceful use of nuclear technology. Conflict between these perspectives is especially sharp over fuel cycle technology, the ultimate “dual use” capability (for the same material that fuels power and research reactors can, at higher levels of fissile isotope concentration, be used in nuclear bombs).

For those holding that the NPT's three core bargains have equal standing, the right of non-weapons states to safeguarded enrichment is clear—from the Treaty itself, from its negotiating history, and from subsequent practice, with at least a dozen non-weapons states building fuel-cycle infrastructures potentially capable of supporting weapons programs. From a positivistic perspective, the denial of that right by a handful of powerful states amounts to an effort to rewrite the NPT unilaterally. Not surprisingly, the camp espousing this position includes the non-Western world, virtually in its entirety. By contrast, those claiming that nonproliferation trumps the NPT's two other core bargains claim that there is no treaty-based

³⁷ Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml>.

“right” to enrich. From a policy-oriented perspective, the manner in which non-weapons states pursue the peaceful use of nuclear technology must necessarily be subordinated to the NPT’s overriding goal of stopping the spread of nuclear weapons. This position is advocated primarily by Western powers, including the United States.

Strikingly, Washington once held that the right to peaceful use includes the indigenous development of safeguarded fuel cycle capabilities. In 1968, as America and the Soviet Union, the NPT’s sponsors, prepared to open it for signature, U.S. officials told Congress that the Treaty permitted non-weapons states to pursue the fuel cycle.³⁸ Since the Cold War’s end, though, the United States—along with Britain, France, and Israel—has been determined to constrain the diffusion of fuel cycle capabilities to non-Western states. Their main motive has been to maximize America’s freedom of unilateral military initiative and, in the Middle East, that of Israel.

Thus, the United States has come to hold that there is no treaty-based right for non-weapons states to pursue fuel cycle capabilities, and that weapons states and their allies with nuclear industries are entitled to decide which non-weapons states can possess fuel cycle technologies. From these premises, in the early 2000s the Bush administration sought a worldwide ban on transferring fuel cycle technologies to countries not already possessing them.³⁹ The Obama administration then pushed the Nuclear Suppliers’ Group to make such transfers conditional on recipients’ acceptance of the Additional Protocol to the NPT—an instrument devised at U.S. instigation in the 1990s to enable more intrusive and proactive inspections in non-weapons states.⁴⁰

Non-Western states see these efforts to constrain the diffusion of fuel cycle capabilities as a far greater threat to the NPT’s integrity than Iran’s nuclear activities. Among rising powers, Brazil and South Africa—both nonproliferation exemplars for joining the NPT as non-weapons states after forsaking weapons programs

³⁸ Daniel Joyner, *The Security Council as Legal Hegemon*, 43 GEO. J. INT’L L. 225, 243 (2012).

³⁹ JOYNER, *supra* note 2, at 47-51, 55-60, 78-87.

⁴⁰ *Id.* at 110-12.

during democratization (including, in South Africa's case, dismantling six fully fabricated nuclear bombs that Israel helped the *apartheid* regime to assemble)—have been especially resolute in defending non-weapons states' right to the fuel cycle. With Argentina, they resisted U.S. efforts to make transfers of fuel cycle technology contingent on non-weapons states' acceptance of the Additional Protocol (which Brazil has refused to sign), ultimately forcing Washington to compromise.⁴¹

B. The NPT and Iranian Enrichment

Currently, the conflict over how to read the NPT with respect to non-weapons states' fuel cycle activities is engaged most prominently over whether Iran, as a non-weapons party to the Treaty, has a right to enrich uranium under international safeguards. Disagreements over the issue are effectively blocking efforts to resolve the controversy over the Islamic Republic's nuclear program through diplomacy.

In the Iranian case, just four countries—the United States, Britain, France, and Israel (which is not a signatory to the NPT)—have led the charge to deny the Islamic Republic's right to enrich. In these countries' official view, Iran has forfeited whatever "right" to enrich that its representatives might assert because of problems in its compliance with its IAEA safeguards agreement that cast doubt on the peaceful nature of its nuclear program. Western and Israeli intelligence services also claim that the Islamic Republic has done at least theoretical work on aspects of nuclear weapons design and fabrication, thereby raising further serious questions about the peaceful nature of its program. Since 2006, moreover, the United Nations Security Council has adopted seven resolutions calling on Iran to suspend its fuel cycle activities.⁴² The Islamic Republic has yet

⁴¹ David Jonas, John Carlson, Richard Goorevich, *The NSG Decision on Sensitive Nuclear Transfers: ABACC and the Additional Protocol*, ARMS CONTROL ASSOCIATION (Nov. 2012), http://www.armscontrol.org/act/2012_11/The-NSG-Decision-on-Sensitive-Nuclear-Transfers-ABACC-and-the-Additional-Protocol.

⁴² S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1887, U.N. Doc.

to comply with these resolutions, prompting Western criticism of its failure to meet its “international obligations.” For America and its British, French, and Israeli partners, any diplomatic solution to the Iranian nuclear issue will require Iran to terminate its fuel cycle activities—or, at least, to stop them on an open-ended and long-term basis (at least a decade, if not longer).⁴³

In contrast, the “BRICS” (Brazil, Russia, India, China, South Africa) and the Non-Aligned Movement (with 120 countries representing nearly two-thirds of U.N. members) have unequivocally recognized Iran’s right—as well as that of other non-weapons states—to develop safeguarded indigenous fuel cycle capabilities.⁴⁴ Their position strongly reflects both a positivistic conception of international order and an interpretation of the NPT ascribing equal standing to its three core bargains.

From a positivistic point of view, none of the claims by Western intelligence agencies about Iranian research on nuclear weapons design and fabrication has been substantiated by hard evidence, and none contradicts the IAEA’s continuing affirmation of Iran’s non-diversion of nuclear material. Through a positivistic prism, moreover, one cannot legitimately hold that the NPT prohibits the Islamic Republic from seeking the same standing, in terms of its nuclear infrastructure and capabilities, as Japan, Canada, and others

S/RES/1887 (Sept. 24, 2009); and S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

⁴³ Discussions with American, British, and French officials. Western powers demand that Iran promptly stop enriching at the near-20 percent level; it must then comply with Security Council calls to cease all enrichment. U.S. officials say that Iran might be “allowed” a circumscribed enrichment program, after suspending for a decade or more; on this point, *see also* Robert Einhorn, *Getting to ‘Yes’ with Iran*, FOR. POL’Y (July 10, 2013), http://www.foreignpolicy.com/articles/2013/07/10/getting_to_yes_with_iran. London and Paris insist that “zero enrichment” is the only acceptable long-term outcome.

⁴⁴ *See BRICS Summit draws clear red lines on Syria, Iran*, BRICS POST (Apr. 3, 2013), http://thebricspost.com/brics-summit-draws-clear-red-lines-on-syria-iran/#.Uewc_UrD-AI; Jason Ditz, *Non-Aligned Movement Unanimously Backs Iran’s Civilian Nuclear Program*, ANTIWAR.COM (Aug. 31, 2012), <http://news.antiwar.com/2012/08/31/non-aligned-movement-unanimously-backs-irans-civilian-nuclear-program/>.

that joined the Treaty as non-weapons states but are widely seen as able to produce nuclear weapons in relatively short order, should they choose to do so. Mohamed ElBaradei, the Nobel laureate under whose leadership the IAEA correctly assessed Iraq's lack of weapons of mass destruction (WMD) when every Western intelligence agency got it wrong, has said that developing nuclear weapons capability—not weapons, but competencies needed to make them—is “kosher” under the NPT.⁴⁵

For many positivistically-inclined analysts, the Security Council resolutions calling on the Islamic Republic to suspend enrichment violate Iran's rights as both a sovereign state and as a party to the NPT. By extension, they also violate United Nations Charter provisions directing that the Security Council act “in accordance with the purposes and principles of the United Nations” and “with the present charter” and are, thus, invalid.⁴⁶ Additionally, the first of these resolutions, from 2006—on which all of the subsequent resolutions are based—reflects an assessment of Tehran's intent to build nuclear weapons that America's own intelligence community repudiated in 2007. This repudiation arguably nullifies the legal basis for all seven resolutions calling on Iran to suspend enrichment.⁴⁷

For non-Western states and others holding that the NPT's three core bargains have equal standing, the outlines of a diplomatic solution to the Iranian nuclear issue are as clear as Iran's right to enrich: recognition of Iran's nuclear rights in exchange for greater transparency in its nuclear activities. Working with Turkey, Brazil brokered the Tehran Declaration in May 2010, in which Iran accepted U.S. terms to swap most of its then stockpile of enriched

⁴⁵ See Mohamed ElBaradei, A New Global Security System Towards a World Free From Nuclear Weapons at John F. Kennedy School of Government, Harvard University (Apr. 26, 2010), <http://forum.iop.harvard.edu/content/new-global-security-system-towards-world-free-nuclear-weapons-conversation-mohamed-el>.

⁴⁶ For a brilliant exposition of this argument, see Joyner, *supra* note 38.

⁴⁷ Flynt Leverett & Hillary Mann Leverett, *America's Iran Policy and the Undermining of International Order*, WORLD FIN. REV., July-August 2013, at 40, <http://law.psu.edu/file/TWFR%20Jul-Aug%202013America%20Iran-v2.pdf>.

uranium for fuel for its research reactor.⁴⁸ The Declaration, though, also recognized Iran's right to enrich; for this reason, the Obama administration rejected it.⁴⁹ Through the Non-Aligned Movement and other fora, non-Western states regularly reiterate their view that a negotiated settlement of the Iranian nuclear issue will require Western acknowledgment of the Islamic Republic's nuclear rights. From this premise, Security Council resolutions requiring Iran to suspend, rather than encourage, productive diplomacy.⁵⁰ Even Russia and China, the Security Council's two non-Western members, who acquiesced in all seven resolutions telling Tehran to suspend, note regularly that there will be no diplomatic solution absent Western recognition of Iran's nuclear rights.⁵¹

The basic idea of recognizing Iran's nuclear rights, as a sovereign state and as a signatory to the NPT (including the right to enrich uranium under international safeguards), in exchange for greater transparency surrounding Iran's nuclear activities, has long been the core of the Islamic Republic's approach to nuclear diplomacy with the P5+1 (the five permanent members of the U.N. Security Council plus Germany). Since Hassan Rohani's election as Iran's president in 2013, the Islamic Republic's new foreign minister, Javad Zarif, has advanced a substantive proposal to the P5+1 for resolving the nuclear issue on this basis, within a finite period. But the Obama administration and its British and French partners continue to insist, effectively, that "transparency is not enough"—

⁴⁸ See *Text of the Iran-Brazil-Turkey deal*, Julian Borger's *Global Security Blog*, GUARDIAN, May 17, 2010, <http://www.guardian.co.uk/world/julian-borger-global-security-blog/2010/may/17/iran-brazil-turkey-nuclear>.

⁴⁹ See Flynt Leverett & Hillary Mann Leverett, *Flynt Leverett Debates Obama's Iran Policy with Dennis Ross*, RACE FOR IRAN (Jan. 12, 2012), <http://www.raceforiran.com/flynt-leverett-debates-obama%E2%80%99s-iran-policy-with-dennis-ross>.

⁵⁰ On the unhelpful impact of the Security Council resolutions on nuclear diplomacy with Tehran, see, for example, Reza Nasri, *To Nudge Iran Talks, New Resolution Needed*, CHRISTIAN SCI. MONITOR (Apr. 25, 2013), <http://www.csmonitor.com/layout/set/print/Commentary/Opinion/2013/0425/To-nudge-Iran-talks-new-UN-resolution-needed>.

⁵¹ Conversations with Russian and Chinese officials suggest that Moscow and Beijing acquiesced to these resolutions partly to keep the United States in the Security Council on the Iranian nuclear issue, where they can exert ongoing influence—and restraint—over Washington.

that, if Iranian enrichment can be tolerated at all (and it remains unclear that Washington, London, and Paris are prepared to tolerate it), the Western powers must become, in essence, co-managers of the Iranian nuclear program, determining which Iranian nuclear facilities must be closed and which might be allowed to remain open, determining not how many additional centrifuges Iran might be allowed to install in the future but how many centrifuges it must dismantle to satisfy the United States (and Israel).

How these differences over Iran's nuclear activities are handled will profoundly affect the future of the nuclear nonproliferation regime. In his contribution to this symposium, Daniel Joyner rigorously scrutinizes the NPT and the various legal sources for the IAEA's dealings with Iran; from this analysis, he comes down on the side of an essentially positivistic reading of the Iranian nuclear case.⁵² Just as importantly, he and Richard Butler both warn that warped interpretations of the NPT, distorted readings of the IAEA's legal sources, and biased application of the law by America and its European hangers-on will further undermine the functioning of the current nonproliferation regime, the credibility and legitimacy of which are already eroding for ever larger parts of the international community.⁵³

IV. THE IRANIAN NUCLEAR CASE AND USE OF FORCE DOCTRINE

Tensions between the two divergent conceptions of international order described above are also reflected in debates over the proper interpretation of use of force doctrine⁵⁴ and its application to the Iranian nuclear case. To put the question in its simplest form, if some states judge, based on their particular (and almost certainly policy-oriented) readings of the NPT, that the Islamic Republic is in violation of its Treaty obligations, can they find legal justification for a preventive attack against it?

⁵² Joyner, *supra* note 2.

⁵³ Butler, *supra* note 2.

⁵⁴ See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005) (outlining four schools of thought, two of which, labeled "strict constructionist" and "imminent threat," fall into what is described here as the positivist camp, and two of which, labeled "qualitative threat" and "charter-is-dead," fall into the policy-oriented camp).

The perceived risk of a U.S. or Israeli attack on Iranian nuclear facilities (and, in the U.S. case, perhaps other targets) waxes and wanes. With Rohani's election, the resumption of nuclear talks between the P5+1 and Iran, and the Obama administration's failed plan to strike Syria, the likelihood of military action seems, at least for now, to have declined. But, if the United States and its British and French partners are not prepared to adopt a more positivistic reading of the NPT and to deal with the Iranian nuclear issue on such a basis, then the current diplomatic effort between Iran and the P5+1 will fail. And if diplomacy fails, the perceived risk of a U.S. or Israeli strike on the Islamic Republic's nuclear infrastructure will rise once again, particularly as that infrastructure continues to develop and expand. What does international law have to say about this?

Under a positivistic reading of international law, there are two circumstances under which a state may legitimately use force. One is when the United Nations Security Council has adopted a resolution under Chapter VII of the United Nations Charter authorizing the use of force in response to a specified threat to international peace and security. The other is under a narrow reading of the right of individual or collective self-defense as defined in Article 51 of the Charter. This requires evidence of either an actual armed attack or a threat of attack so imminent that a forceful response to it satisfies a strict construal of the legal principle of necessity and can be carried out in compliance with the legal principle of proportionality.⁵⁵ In the absence of a Chapter VII resolution from the Security Council or a case meeting such a rigorous definition of self-defense, a state does not have the right to use force.

It is highly unlikely that there will be a Security Council resolution authorizing the use of force against Iran over its nuclear activities, which eliminates one of the two potential legal justifications for attacking Iranian nuclear targets. In the Iranian case, Russia and China have learned from what they consider the bitter experience of the Council's engagement on WMD issues prior to the 2003 invasion of Iraq, when Western powers justified the invasion in part by arguing that resolutions adopted more than a decade earlier in

⁵⁵ See *id.* (expanding on the "strict constructionist" and "imminent threat" schools); Kleimann, *supra* note 30; Mary Ellen O'Connell, *supra* note 2.

connection with the first Persian Gulf war also authorized the use of force against Iraq in 2003.⁵⁶ As a result, Moscow and Beijing have made sure that Security Council resolutions dealing with the Iranian nuclear issue state explicitly that nothing in them can be construed as authorizing the use of force, and that such authorization would require separate action by the Council.

But the lack of Security Council authorization does not definitively constrain policy-oriented analysts and American officials, who tend to downplay the centrality of the Council for contemporary decision-making about the use of force.⁵⁷ Some argue that the threat of “WMD-seeking rogue states” has attenuated traditional readings of the United Nations Charter on the Council’s role in addressing threats to international peace and security.⁵⁸ Others, like neoconservative John Yoo, go so far as to argue that the United States is entitled simply to ignore the Council on the grounds that it “lacks political legitimacy” and “is contrary to both American national interests and global welfare because it subjects any intervention, no matter how justified or beneficial, to the approval of authoritarian nations.”⁵⁹

With the Security Council deemed irrelevant, the policy-oriented case for launching a war against the Islamic Republic over its nuclear activities relies on the notion of preventive self-defense.⁶⁰ Consider, in this regard, Matthew Kroenig’s widely noted brief for U.S. strikes on Iran’s nuclear infrastructure. Kroenig begins his brief by asserting “the true danger that a nuclear-armed Iran would pose to U.S. interests in the Middle East and beyond” is so great as to

⁵⁶ This point was especially salient in the arguments that the British and Australian governments offered; while some American officials, most notably Secretary of State Colin Powell, suggested that the United States shared the official British and Australian view, this argument was not a major part of the Bush administration’s formal case for war. See Alex Bellamy, *International Law and the War With Iraq*, 4 MELB. J. INT’L L. 497 (2003), for further discussion on this topic.

⁵⁷ Murphy, *supra* note 52, (discussing the “charter-is-dead” school).

⁵⁸ Matthew Waxman, *The Use of Force Against States that Might Have Weapons of Mass Destruction*, 31 MICH. J. INT’L L. 1 (2009).

⁵⁹ John Yoo, *An Unavoidable Challenge*, NAT’L REV. (Dec. 31, 2011), <http://www.nationalreview.com/articles/286953/unavoidable-challenge-john-yoo>.

⁶⁰ This was also a major part of the Bush administration’s case for invading Iraq in 2003. See Bellamy, *supra* note 54.

require, at least for Kroenig and other like-minded analysts, a heightened, post-9/11 formulation of imminent threat. As for proportionality, Kroenig posits that “a military strike intended to destroy Iran’s nuclear program, if managed carefully, could spare the region and the world a very real threat and dramatically improve the long-term national security of the United States.”⁶¹

For this to work, though, the definition of “U.S. interests in the Middle East and beyond” and “the long-term national security of the United States” must be stretched to encompass not just physical security but what might more accurately be described as hegemonic preference. Consider what Kroenig himself writes regarding the real motive for a prospective U.S. attack on Iran: “a nuclear armed Iran would immediately limit U.S. freedom of action in the Middle East.”⁶² The reasoning underlying John Yoo’s advocacy of a preventive U.S. attack on Iran is even more expansively hegemonic:

The United States has assumed the role, once held by Great Britain, of guaranteeing free trade and economic development, spreading liberal values, and maintaining international security. An attack on Iranian nuclear facilities, though it would impose costs in human lives and political turmoil, would serve these interests and forestall the spread of conflict and terror.⁶³

From a positivistic perspective, this amounts to a reading of the right of self-defense so tortured that virtually no other state besides the United States (or Israel) would accept it as justification for a preventive attack against the Islamic Republic. But this is precisely the argument that will be deployed, if and when the time comes, to validate U.S. strikes against Iranian nuclear facilities. U.S. government lawyers are already drafting their briefs, should President Obama decide in the next three years that the development of the

⁶¹ Matthew Kroenig, *Time to Attack Iran: Why a Strike Is the Least Bad Option*, FOR. AFF., Jan-Feb. 2012, at 77, <http://www.foreignaffairs.com/articles/136917/matthew-kroenig/time-to-attack-iran>.

⁶² *Id.* at 78.

⁶³ Yoo, *supra* note 57.

Islamic Republic's fuel cycle capabilities has gone too far for his strategic or political comfort.

How the debate over the prospective use of force by the United States against Iran's nuclear infrastructure plays out will have hugely important implications for the future of world order. In her contribution to this symposium, Mary Ellen O'Connell presents a rich exposition and defense of the U.N. Charter regime regarding the use of force, along with an essentially positivistic application of this regime and other relevant law to the prospective use of force against Iranian nuclear targets. This leads her to a firm rejection of the unilateral resort, by the United States or others, to armed coercion against the Islamic Republic.⁶⁴ James Houck, in his contribution, evinces sympathy for arguments that a strict reading of the U.N. Charter regime is not universally helpful to real-world decision-makers in an era of WMD and demonstrated threats of terrorism. Nevertheless, he also notes that, at this point, he has seen no evidence or argument to date in the public domain leading him to judge that a predicate currently exists for an armed attack on Iran.⁶⁵

How this debate plays out will also have enormous implications for America's position in the international community. As Americans engage in the debate, they would do well to consider James Houck's observation that there is much in public discussions of these issues in the United States that is undermining and disrespectful of international law.⁶⁶ Such a trend, if perpetuated, will prove corrosive not only of the prospects for genuinely rules-based international order in the 21st century, but also of America's standing and role in world affairs.⁶⁷

Restoring America's international standing and influence—and boosting the prospects for rules-based international order in the 21st century—will require very substantial strategic revision by the United States. Consider, once again, the Obama administration's

⁶⁴ O'Connell, *supra* note 53.

⁶⁵ See Presentation of James Houck at Symposium, video available at <http://elibrary.law.psu.edu/jlia>.

⁶⁶ *Id.*

⁶⁷ This is explored more deeply in Mann Leverett, *supra* note 12.

publicly announced plan to use force—without any legal justification under the U.N. Charter—in Syria. After August 21, 2013, much of America’s political class was initially still inclined to support President Obama’s call for military action. Much of the mainstream media comported themselves with the same lack of journalistic rigor that so many media outlets displayed in evaluating the Bush administration’s case for illegally invading and occupying Iraq in 2003. But, in 2013, the American public rejected a sitting president’s case for imperial war—and rejected it overwhelmingly, to a point where even many congressmen and senators who would otherwise have backed Obama’s initiative concluded that, this time, they could not do so. It is not yet possible to know if Americans’ rejection of Obama’s call for illegal and strategically dysfunctional U.S. military action against Syria represents the beginning of a true sea change in popular attitudes about American foreign policy. Perhaps it was simply the product of a contingent concatenation of circumstances—post-Iraq/(not quite) post-Afghanistan/post-Libya “war weariness,” frustration with a slow economic recovery and an uncertain long-term economic future, etc. But perhaps Americans are at least at the start of a true learning curve. Only time will tell.

Penn State Journal of Law & International Affairs

2013

VOLUME 2 NO. 2

NPT: A PILLAR OF GLOBAL GOVERNANCE*

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It is of basic importance to remember the negotiating history of the Nuclear Nonproliferation Treaty (NPT) when policymakers and academics analyze the Iran nuclear issue. At the core of that history was a grand bargain between states with and without nuclear weapons. Since then, states have taken a number of steps away from that bargain, and some have even attempted to suggest there was no grand bargain at the outset. Each of these steps has led to serious problems.

KEY ELEMENTS OF THE NPT

The NPT has three components: preventing the proliferation of nuclear weapons;¹ nuclear disarmament;² and protecting the right

* This essay was adapted from the transcribed remarks of Ambassador Richard Butler AC delivered on February 15, 2013 at the annual symposium of the *Penn State Journal of Law & International Affairs* on *The U.S.-Iranian Relationship and the Future of International Order*. Video of the symposium is available at http://law.psu.edu/academics/journals/law_and_international_affairs/lectures_and_symposia.

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of all states to access nuclear science and technology.³ That was the deal then, in all of its parts, and, for the overwhelming number of states in the world today, it should remain the deal.

It also is essential to note a second political point about this treaty. Almost from the beginning, the Treaty has been misrepresented and mis-described, principally by the nuclear-weapon states.⁴ I have sat in countless conferences with representatives from such states, in which they have attempted to tell the world that the Treaty is not about the three components listed above, but rather about only one—preventing others from getting the bomb. Over and over again, the nuclear-weapon states have sought to reinterpret NPT to what they consider their own advantage.

There are many examples of this perspective. However, the example that sticks in my recent memory, which is highly relevant to the Iran issue, was when then-President of the United States, George W. Bush, told the world that the reason Iran must not be allowed to have nuclear weapons is, something to the effect of, *because of the kind of people they are*. I won't dignify this viewpoint by commenting on the obviously racist, or, at the very least, culturally discriminatory aspect of the statement, but I simply point out that this is not what the Treaty says. What it states is that Treaty partners who do not have nuclear weapons—referred to as the non-nuclear-weapon state parties in the Treaty, of which Iran is one—should never get them. This is because the NPT is designed to stop the spread of nuclear weapons and to foster the elimination of those already in existence. Whether or not the nuclear-weapon states like this, these two objectives should be seen as inherently linked.

¹ Treaty on the Non-Proliferation of Nuclear Weapons art. III, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

² NPT, *supra* note 1, at art. VI.

³ NPT, *supra* note 1, at art. IV.

⁴ The “nuclear-weapon” states party to the NPT are the United States, the Soviet Union (replaced by Russia), the United Kingdom of Great Britain and Northern Ireland, France, and the People's Republic of China. *See* U.S. DELEGATION TO THE 2010 NUCLEAR NONPROLIFERATION TREATY REVIEW CONFERENCE, ORIGINS OF THE NPT 2 n.1 (2010), <http://www.state.gov/documents/organization/141503.pdf>.

There is another relevant anecdote I feel compelled to tell, as it has bearing on a mindset that has dogged the NPT. A number of years ago, I visited the head of the United States Arms Control Disarmament Agency, that is, before a subsequent U.S. Administration abolished it.⁵ Its head was Kenneth Adelman. I had sought an appointment with Ken in my capacity as the Australian Ambassador for Disarmament. I spoke with him about what we hoped to achieve in arms control and his responsibilities. I mentioned the Nuclear Nonproliferation Treaty and safeguards inspections including those that were to take place in the United States. He became agitated, stopped me, and asked, “What did you just say? Inspections of the U.S.?” I said, “Well, inspections of your peaceful facilities, not your military facilities.” And he said, “You’re telling me that we have to accept inspections on our facilities?” I said, “Yes, I am.” He said, “No, no, those inspections are to be made of the Russians. They’re the ones who get inspected, not us.” This conversation illustrates the whole notion of good guys and bad guys. It brings to mind the old saying one hears a lot in the disarmament business: disarmament is a great idea, for the other guy.

I am not simply seeking to make fun of this outlook. I am seeking to illustrate that, since the adoption of the NPT, there has been a pervasive view in nuclear-weapon states circles, as reflected in the stories I’ve told you, that the Treaty is essentially about nonproliferation, not nuclear disarmament. This view is factually incorrect.

Embedded in such thinking is also the view that there are legitimately held nuclear weapons. At the present time, this view is consistent with the terms of the Treaty. More specifically, there exists the view that the legitimately held nuclear weapons are those held by our side—by the good guys. All other weapons held or aspired to, especially by adversaries or people of whom we do not approve, are illegitimate.

There are several points to be made about this outlook. First, it is factually incorrect. The NPT is directed to the elimination of *all*

⁵ See Press Release, The White House, Reinventing State, ACDA, USIA and AID (Apr. 18, 1997), <http://dosfan.lib.uic.edu/acda/aboutacd/gore.htm>.

nuclear weapons. Second, it is deeply damaging to the Treaty because it has little or no relationship to the negotiating history of the Treaty. Finally, if pursued further, this outlook will destroy the Treaty.

Let's return to the first of these points. The Treaty envisages a world without nuclear weapons. That some people seek to dispute this historical fact borders on the mind-numbing. How else can one logically interpret a document about nuclear weapons, which establishes that those who do not have them must never get them and that those who do have them must get rid of them? The NPT's objective is to create a world without nuclear weapons. That objective is not served by the sort of flagrant, self-serving misinterpretation of it described above.

1995 REVIEW CONFERENCE ON THE NPT

The NPT provides that after 25 years of its operation, a conference of all parties will be held to determine its future: "Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty."⁶ In 1995, the world gathered for the Review and Extension Conference of the Nuclear Nonproliferation Treaty to decide whether or not the NPT should continue to exist.⁷

I led Australia's delegation to that conference, and the final deal, done at five minutes to midnight on the last night, was done around my dining room table. I had been asked to convene a small group of the principal actors and to put an agreement together. Interestingly, that group of sixteen principals included the representative from Iran. And the deal was done. It was agreed to extend the Nuclear Nonproliferation Treaty indefinitely. So, the NPT is to exist in perpetuity.

⁶ NPT, *supra* note 1, at art. X, § 2.

⁷ See *1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: 17 April to 12 May 1995 – New York, U.N.*, <http://www.un.org/depts/ddar/nptconf/162.htm> (last visited Sept. 17, 2013).

That agreement should have been easy to reach. It was widely recognized that the NPT gave expression to an utterly desirable norm in civilized human life—that no one should have nuclear weapons. It is the sole international agreement that aspires to this end.

Notwithstanding these values, indefinite extension was only narrowly achieved. The non-nuclear-weapon states who are party to the NPT were thoroughly sick of the fundamental inequality embedded in the NPT.⁸ The Treaty attempts to bridge the gap between nuclear-weapon states and non-nuclear-weapon states by placing upon the former the obligation to progressively reduce their weapons. However, it has been widely noted that the nuclear-weapon states have implemented this obligation inadequately, if at all. In response, the nuclear-weapon states argued that the Treaty had been working well and that criticism of their tardiness in fulfilling their nuclear disarmament obligations was unjustified.⁹

A group of states who were parties to the Treaty, including, very significantly, Egypt, gave serious thought to both leaving the NPT and refusing to agree to its extension.¹⁰ They were talked out of it, mainly through agreement being given to an Egyptian proposal that there be a future conference aimed at establishing the Middle East as a zone free of nuclear weapons.¹¹ The call for a nuclear free zone in the Middle East, of course, brought to the forefront the

⁸ See *Document on Substantive Issues Submitted by Indonesia on Behalf of the Group of Non-Aligned and Other States*, U.N. Doc. NPT/CONF. 1995/14 (Apr. 6, 1995), <http://www.un.org/depts/ddar/nptconf/211a.htm>.

⁹ See *Declaration dated 6 April 1995 by France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America in connection with the treaty on the Non-Proliferation of Nuclear Weapons*, U.N. Doc. NPT/CONF.1995/20 (Apr. 19, 1995), <http://www.un.org/depts/ddar/nptconf/2102.htm>.

¹⁰ See Carol Giacomo, *U.S. pessimistic on Egypt support for nuclear pact*, REUTERS, Feb. 9, 1995.

¹¹ *Resolution on the Middle East*, U.N. Doc. NPT/CONF. 1995/32 (Part I), Annex (Apr. 19, 1995), http://www.un.org/disarmament/WMD/Nuclear/1995-NPT/pdf/Resolution_MiddleEast.pdf. See *Arab resolution to call on Israel to join NPT*, AGENCE FRANCE PRESSE ENGLISH WIRE, May 9, 1995; *Resolution on the Middle East*, U.N. Doc. NPT/CONF. 1995/32 (Part I), Annex (Apr. 19, 1995), http://www.un.org/disarmament/WMD/Nuclear/1995-NPT/pdf/Resolution_MiddleEast.pdf.

question of Israel's nuclear weapons capability. To be blunt, Israel would have to be at that conference table.¹²

The vision of a nuclear free zone in the Middle East has not been implemented even though it was renewed in the [2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons \(NPT\)](#). As a result, Egypt has essentially walked out of the preparations for the 2015 review conference.¹³

IRAN AND THE NPT

Turning now specifically to Iran, under Article IV, Iran has the right to nuclear science and technology.¹⁴ Specifically, as a non-nuclear-weapon state party to the NPT, Iran has the right to develop, research, produce, and use nuclear energy for peaceful purposes.¹⁵ But, under Articles II and III of the Treaty and their derivatives, Iran has two key obligations: (1) its activities in nuclear science and technology must be conducted under full International Atomic Energy Agency safeguards, and (2) it must not make a nuclear explosive device. For some while now, the IAEA has reported to its board and to the U.N. Security Council that Iran is not fulfilling the first of these obligations.¹⁶ This has given rise to the suspicion that Iran is pursuing the development of a nuclear explosive capability. Neither the IAEA nor national intelligence agencies have yet

¹² See *Israel not likely to sign nuclear pact*, WASH. TIMES, Feb. 1, 1995, available at 1995 WLNR 300991; *Israel to Sign Treaty*, PITTSBURGH POST-GAZETTE, Mar. 24, 1995, available at 1995 WLNR 2408249.

¹³ Stephanie Nebehay, *U.S. regrets Egypt walk-out at nuclear talks*, REUTERS, Apr. 30, 2013, <http://uk.reuters.com/article/2013/04/30/uk-nuclear-npt-egypt-idUKBRE93T0KZ20130430>.

¹⁴ NPT, *supra* note 1, at art. IV.

¹⁵ *Id.*

¹⁶ Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, Rep. of the Dir. Gen., IAEA Doc. GOV/2012/55 (Nov. 16, 2012), <http://www.iaea.org/Publications/Documents/Board/2012/gov2012-55.pdf>; IAEA, *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, Rep. of the Dir. Gen., IAEA Doc. GOV/2013/27 (May 22, 2013), <http://www.iaea.org/Publications/Documents/Board/2013/gov2013-27.pdf>.

concluded, definitively, that Iran has made a prohibited device. Yet, suspicion that Iran is headed in that direction is deep and held in key capitals.¹⁷

What would be the consequence of an “Iranian breakout,” to use the jargon of the nuclear nonproliferation business? Clearly, such action would wound the Treaty deeply. Many states that were reticent to agree to its indefinite extension would conclude that they had made a mistake. It is not clear that such events would bring the Treaty down entirely, but it is clear that if Iran did actually make a nuclear explosive device, a regional nuclear arms race would ensue. In that case, the NPT might become a dead letter.

Further, a regional nuclear arms race would greatly elevate the prospect of regional war in the Middle East. This, in turn, could involve states outside the region. I’m referring, of course, to an Israeli or Israeli/U.S. attack upon Iran on the eve of Iran acquiring nuclear weapons capability—when a so-called red line¹⁸ set by Israel and/or the U.S. has been crossed. Where such events would lead is incalculable but assumed to be of a massive order of magnitude.

I cannot resist pointing out to you the bitter irony, the grotesque nature, of what elementally would be involved in such a scenario: Israel, a non-party to the NPT but with clandestine nuclear arms capability,¹⁹ attacking another state, presumably with the

¹⁷ See IAEA, *Communication dated 4 March 2008 from the Governor for the Russian Federation and the Resident Representatives of China, France, Germany, the United Kingdom and the United States of America concerning U.N. Security Council resolution 1803* (2008), IAEA Doc. INFCIRC/723 (Mar. 5, 2008), <http://www.iaea.org/Publications/Documents/Infircs/2008/infirc723.pdf>; IAEA, *Communication dated 12 March 2009 received from the Permanent Missions of China, France, Germany, Russia, the United Kingdom and the United States of America regarding a joint statement on Iran’s nuclear programme*, IAEA Doc. INFCIRC/749 (Apr. 1, 2009), <http://www.iaea.org/Publications/Documents/Infircs/2009/infirc749.pdf>.

¹⁸ See Arshad Mohammed, *Key portions of Israeli PM Netanyahu’s U.N. speech on Iran*, REUTERS, Sept. 27, 2012, <http://www.reuters.com/article/2012/09/27/us-un-assembly-israel-text-idUSBRE88Q1RR20120927>; Michael Martinez, *Netanyahu asks U.N. to draw ‘red line’ on Iran’s nuclear plans*, CNN.COM, Sept. 28, 2012, <http://www.cnn.com/2012/09/27/world/new-york-unga/index.html>.

¹⁹ See IAEA, *Israeli nuclear capabilities*, Rep. of the Dir. Gen., IAEA Doc. GOV/2010/49-GC(54)/14 (Sept. 3, 2010),

support, if not the direct participation, of a state recognized by the NPT as a nuclear-weapon state, in order to prevent the state under attack from acquiring nuclear weapons—the very weapons the belligerent states insist are essential to their national security. As satirists sometimes remark when introducing an absurd or amazing piece of human behavior, “you can’t make this stuff up!”

Flynt Leverett, in his most recent book and numerous other writings, has raised important questions about the nature and future of global governance—particularly in the context of the NPT and the case of Iran.²⁰ In my opinion, if developments of the kind I have just described were to occur, and the Nuclear Nonproliferation Treaty was to be seriously harmed, we would witness a significant breakdown in the current system of global governance.

Why? Because the international community of states has said for over 40 years now that the Nuclear Nonproliferation Treaty is the “cornerstone” of nuclear arms control. The NPT has the most member states of any treaty in existence, after the U.N. Charter and Geneva Conventions.²¹ All but four states are parties to it, and this is

http://www.iaea.org/About/Policy/GC/GC54/GC54Documents/English/gc54-14_en.pdf. See also James Conca, *Israel Has Nuclear Weapons, But Only Iran Has Nuclear Power*, FORBES, Oct. 21, 2012, <http://www.forbes.com/sites/jamesconca/2012/10/21/does-anyone-care-about-irans-nuclear-energy-program/>.

²⁰ See generally FLYNT LEVERETT & HILLARY MANN LEVERETT, *GOING TO TEHRAN: WHY THE UNITED STATES MUST COME TO TERMS WITH THE ISLAMIC REPUBLIC OF IRAN* (2013). See also Flynt Leverett & Hillary Mann Leverett, *America’s Iran Policy and the Undermining of International Order*, WORLD FIN. REV., July-Aug. 2013, at 38-42, http://law.psu.edu/_file/TWFR%20Jul-Aug%202013America%20Iran-v2.pdf.

²¹ See Treaty on the Non-Proliferation of Nuclear Weapons: *Status of the Treaty*, U.N. OFF. FOR DISARMAMENT AFF., <http://disarmament.un.org/treaties/t/npt> (last visited Sept. 17, 2013) (listing 190 states party to the NPT); Growth in United Nations membership, 1945-present, U.N., <http://www.un.org/en/members/growth.shtml> (last visited Sept. 17, 2013) (listing 193 U.N. member states); *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, INT’L COMM. OF THE RED CROSS, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORM_StatesParties&xp_treatySelected=380 (last visited Sept. 17, 2013) (listing 195 states party to the Geneva Convention).

testimony to the profound importance of the matters it covers.²² The NPT has within it a key element of global governance—a system of reporting by the IAEA Board of Governors and ultimate enforcement by the Security Council. If the Treaty's protocol is discarded, a systemic breakdown in global governance will have occurred.

Among the changes that such a breakdown could author is the disappearance of the notion of a commitment, held by both the nuclear haves and have-nots, to a world without nuclear weapons.

Secondly, permanent membership of the Security Council would have to be reconsidered. I have discussed reform of the Security Council in another issue of this journal.²³ Possibly a disaster centered on Iran might prove to be the train wreck that would produce this change in global governance that is so widely regarded as seriously overdue. But I think it would be a costly and highly dangerous way to bring about historical change.

Finally, the reference made at this symposium to the realist school of thought needs a response.²⁴ That school, led by many late and great scholars and today by scholars such as John Mearsheimer,²⁵

²² At the time of publication, India, Pakistan, Israel, and the newly formed Republic of South Sudan were not parties to the NPT.

²³ See Richard Butler AC, *Reform of the United Nations Security Council*, 1 PENN. ST. J.L. & INT'L AFF. 23 (2012), <http://elibrary.law.psu.edu/jlia/vol1/iss1/2>.

²⁴ This is referring to a response to a question from the audience at the February 15, 2013 symposium of the *Penn State Journal of Law & International Affairs*, available at <http://elibrary.law.psu.edu/jlia/>.

²⁵ See JOHN J. MEARSHEIMER, *WHY LEADERS LIE: THE TRUTH ABOUT LYING IN INTERNATIONAL POLITICS* (2011); JOHN J. MEARSHEIMER & STEPHEN M. WALT, *THE ISRAEL LOBBY AND U.S. FOREIGN POLICY* (2007); JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001); JOHN J. MEARSHEIMER, *CONVENTIONAL DETERRENCE* (1983); John J. Mearsheimer, *Structural Realism*, in *INTERNATIONAL RELATIONS THEORIES: DISCIPLINE AND DIVERSITY* 77 (Tim Dunne et al. eds., 3d ed. 2013); John J. Mearsheimer, *The Future of Palestine: Righteous Jews vs. the New Afrikaners*, in *AFTER ZIONISM: ONE STATE FOR ISRAEL AND PALESTINE* 135 (Antony Loewenstein & Ahmed Moor, eds., 2012), <http://mearsheimer.uchicago.edu/pdfs/PalestineFuture.pdf>; John J. Mearsheimer, *Realists as Idealists*, 20 SEC. STUD. 424 (2011),

claims to see the world with crystal clear eyes and to make utterly realistic, logical, scientific calculations.

If I were a realist being asked for advice on Iran, the NPT, and future global governance, I think I would say to those in Washington: Would you please stop making statements on the alleged basis of realism that you cannot fulfill? Preventing Iran by whatever means necessary from becoming a nuclear-weapon state cannot be done. If Iran is determined to go nuclear, it will succeed. Stop making statements on which you cannot deliver. Making such statements, on a realist basis, is extremely dangerous. If you attempt to deliver your proclaimed objective by going to all-out war, you will impose costs on your nations and your people that are simply unbearable and far worse than the problem you've set out to solve.

The true realist and realistic approach is to work to convince Iran that it should not proceed with a weapons program, but accept, as a matter of realism, that this will require concessions by you, and, in particular, you will need to demonstrate your earnestness with respect to the NPT as the cornerstone to a greater degree than ever before.

Last year, a deeply apposite critique of the operation of the NPT was published. At its core, it alleged that the NPT had been characterized by: "selective nonproliferation and ineffectual abolition."²⁶ This is not what Treaty authors or subsequent partners had in mind. True and realistic leadership of global governance would work urgently to reverse this.

<http://mearsheimer.uchicago.edu/pdfs/Realists-Idealists.pdf>.

²⁶ See Campbell Craig & Jan Ruzicka, *Who's in, who's out?* Campbell Craig and Jan Ruzicka on the nonproliferation complex, LONDON REV. OF BOOKS, Feb. 23, 2012, at 37, <http://www.lrb.co.uk/v34/n04/campbell-craig/whos-in-whos-out>.

Penn State Journal of Law & International Affairs

2013

VOLUME 2 No. 2

IRAN'S NUCLEAR PROGRAM AND INTERNATIONAL LAW*

*Daniel H. Joyner***

INTRODUCTION

This essay will provide a discussion and analysis of international legal questions relating to the dispute between Iran and Western states with regard to Iran's nuclear program. In particular, it will consider the competing interpretations between the parties of the Nuclear Nonproliferation Treaty (NPT) and International Atomic Energy Agency (IAEA) safeguards agreements. It then will consider what this legal analysis means for the future of the international nuclear nonproliferation regime.

The current international dispute over Iran's nuclear program began in 2002 when Iranian dissident groups revealed to the IAEA that Iran had constructed two facilities, at Natanz and Arak, the existence of which Iran had not reported to the IAEA.¹ This revelation was subsequently confirmed by Iran, though Iran

* This essay was adapted from the transcribed remarks of Professor Daniel Joyner delivered on February 15, 2013 at the annual symposium of the [Penn State Journal of Law & International Affairs](http://law.psu.edu/academics/journals/law_and_international_affairs/lectures_and_symposia) on *The U.S.-Iranian Relationship and the Future of International Order*. Video of the symposium is available at http://law.psu.edu/academics/journals/law_and_international_affairs/lectures_and_symposia.

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¹ IRAN'S STRATEGIC WEAPONS PROGRAMMES: A NET ASSESSMENT 16 (Gary Samore ed. 2005).

maintained that no fissile (nuclear) materials had been introduced into these facilities, and that they were purposed exclusively for peaceful, civilian use.²

However, Iran's failure to declare the existence of these facilities in what the IAEA considered a timely manner led to further investigations of Iran's nuclear program³ and to the IAEA's determination in November 2003 that, in a number of instances, Iran had been noncompliant with its legal obligations pursuant to its INFCIRC/153 Comprehensive Safeguards Agreement (CSA) with the IAEA.⁴

The CSA is a bilateral treaty between the IAEA and Iran that details the legal relationship between the IAEA and Iran and spells out both Iran's obligations related to nuclear safeguards and the IAEA's authority to conduct investigations and assessments of Iran's nuclear facilities and material.⁵ Specifically, this determination of noncompliance was based upon the discovery of small amounts of undeclared uranium and upon Iran's failure to report the further processing of this material and the facilities in which it had been stored.⁶ In addition, however, the Agency was also concerned about what it saw as Iran's "hiding" of the facilities at Natanz and Arak.⁷

The IAEA Board of Governors (BOG), through a number of resolutions over the next two years, imposed upon Iran a duty of

² Int'l Atomic Energy Agency [IAEA], *Statement by the Iranian Government and Visiting EU Foreign Ministers* (Oct. 21, 2003), http://www.iaea.org/newscenter/focus/iaeciran/statement_iran21102003.shtml.

³ IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, Bd. of Gov., IAEA Doc. GOV/2003/75 (Nov. 10, 2003), <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-75.pdf>.

⁴ IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Resolution adopted by the Board on 26 November 2003*, Bd. of Gov., IAEA Doc. GOV/2003/81 (Nov. 26, 2003), <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-81.pdf>.

⁵ IAEA, *The Text of the Agreement between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. INFCIRC/214 (Dec. 13, 1974), <http://www.iaea.org/Publications/Documents/Infircs/Others/infirc214.pdf>.

⁶ IAEA, *supra* note 4.

⁷ *See id.*

cooperation with the Agency in order to address these issues of noncompliance and to satisfactorily answer the IAEA's remaining questions regarding Iran's nuclear program.⁸ These questions included whether there were yet further aspects to Iran's nuclear program that had not been declared to the IAEA, including possible military dimensions to the program.⁹ Iran's failure to meet this standard of cooperation to the satisfaction of the IAEA BOG, led to the Board's decision in 2006 to refer Iran to the U.N. Security Council.¹⁰

Later that year, the U.N. Security Council adopted Resolution 1696, in which it ordered Iran to cooperate with the IAEA and to suspend its uranium enrichment program.¹¹ Iran's refusal to comply with the demands of this and subsequent Resolutions adopted by the Security Council has led to several rounds of economic and financial sanctions imposed upon Iran by the Security Council.¹² Further, both the United States and the European Union have imposed separate and additional unilateral economic and financial sanctions on Iran due to this impasse.¹³

Since 2002, a number of Iranian civilian nuclear scientists have been assassinated inside Iran, in what Iran alleges to have been

⁸ See IAEA, *supra* note 5.

⁹ See *id.*

¹⁰ Press Release, IAEA, Report on Iran's Nuclear Programme Sent to U.N. Security Council (Mar. 8, 2006), <http://www.iaea.org/newscenter/news/2006/bog080306.html>.

¹¹ Press Release, Security Council, Security Council Demands Iran Suspend Uranium Enrichment by 31 August or Face Possible Economic, Diplomatic Sanctions, U.N. Press Release SC/8792 (July 31, 2006), <http://www.un.org/News/Press/docs/2006/sc8792.doc.htm>.

¹² See S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010). See also Orde F. Kittrie, *Emboldened by Impunity: The History and Consequences of Failure to Enforce Iranian Violations of International Law*, 57 SYRACUSE L. REV. 519, 533-48 (2007).

¹³ See Kittrie, *supra* note 12.

targeted killings orchestrated by Israel.¹⁴ Further, Iran's nuclear facilities have been damaged on multiple occasions by cyberattacks, including through the introduction of the sophisticated Stuxnet and Flame computer viruses/worms into these facilities, which Iran attributes to the United States and Israel.¹⁵ While not confirming their involvement in these events, officials in the United States and Israel have been variously quoted publicly as supporting potential military strikes against Iran's nuclear facilities if a diplomatic resolution to the crisis cannot be reached through negotiations between Iran and the P5+1 group of states (United States, Russia, United Kingdom, China, France, Germany).¹⁶

This discussion analyzes the legal arguments on both sides—meaning, on the one side, Iran; and on the other side, the U.S., Britain, France, Germany, and, to a lesser extent, Russia and China, whom I will collectively (although of course inaccurately) refer to as “the West” —regarding the relevant sources of international nuclear law, and regarding whether Iran has been in compliance with these sources of law. I hope in doing so to flesh out further the nuclear nonproliferation legal framework.

¹⁴ Karl Vick and Aaron J. Klein, *Who Assassinated an Iranian Nuclear Scientist? Israel Isn't Telling*, TIME, Jan. 13, 2012, <http://www.time.com/time/world/article/0,8599,2104372,00.html>.

¹⁵ David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html>. See also DAVID E. SANGER, CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER (2012).

¹⁶ See *Bush Won't Rule Out Military Action Against Iran*, L.A. TIMES, Aug. 14, 2005, <http://articles.latimes.com/2005/aug/14/world/fg-iran14>; Jon Swaine, *Barack Obama: I'm not bluffing on military action against Iran*, TELEGRAPH, Mar. 2, 2012, <http://www.telegraph.co.uk/news/worldnews/barackobama/9119775/Barack-Obama-Im-not-bluffing-on-military-action-against-Iran.html>; Alistair Dawber, *Iran's nuclear ambitions: Israel will not wait until it's too late, warns Benjamin Netanyahu*, THE INDEPENDENT, July 15, 2013, <http://www.independent.co.uk/news/world/middle-east/irans-nuclear-ambitions-israel-will-not-wait-until-its-too-late-warns-benjamin-netanyahu-8709097.html>.

THE “WESTERN” ARGUMENTS

The essential Western legal argument is that Iran has been in the past, and is to this day, in noncompliance with its obligations under its CSA with the IAEA.¹⁷ Again, through IAEA resolutions, the IAEA BOG has imposed on Iran specific requirements of cooperation.¹⁸ And the Western legal argument is that, because those levels of cooperation have not been met—meaning access by inspectors to facilities and Iran’s answering of questions that the IAEA has—the IAEA BOG continues to determine that Iran is in noncompliance with its safeguards agreement obligations.¹⁹ This in turn, has led to an argument by some Western officials that Iran is also in violation of Article III of the NPT, which, in paragraph four, requires Non-Nuclear-Weapon States (NNWS) parties to conclude a safeguards agreement with the IAEA. Thus, there is both the safeguards agreement compliance level, but also a link in this legal argument to compliance with Article III of the NPT.²⁰

One legal interpretation underpinning the Western legal argument regarding Iran’s CSA compliance is regarding the scope of the authority, or mandate of the IAEA, to investigate and to assess compliance with CSA. The Western legal argument—and this is the legal argument also maintained by the IAEA itself—is that the IAEA has the authority and mandate not only to confirm the correctness of Iran’s required declaration of its nuclear materials and facilities under the CSA and the non-diversion of this declared fissile material from peaceful to military uses, but also the authority and mandate to confirm the absence of any undeclared nuclear facilities and materials

¹⁷ See IAEA, *supra* note 4; IAEA, *supra* note 5; IAEA, Rep. of Dir. Gen., *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, IAEA Doc. GOV/2013/27 (May 22, 2013), <http://www.iaea.org/Publications/Documents/Board/2013/gov2013-27.pdf>.

¹⁸ *Id.*

¹⁹ Int’l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, Rep. of the Dir. Gen., at paras. 67-71, IAEA Doc. GOV/2013/27 (May 22, 2012), <http://www.iaea.org/Publications/Documents/Board/2013/gov2013-27.pdf>.

²⁰ Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

inside Iran, *and* any potential nuclear weapons-related activity (i.e., warhead development activity).

In brief, the INFCIRC/153 CSA, which is the only safeguards agreement to which Iran is a party, requires a declaration by the NWS of their fissile materials accounting and their facilities relating to those fissile materials.²¹ The argument of the West and of the IAEA is that the IAEA not only has the right to, and the mandate to, confirm the correctness of that declaration, but also its completeness. This means that the IAEA has the mandate to make sure that the state has declared everything it was supposed to declare. That argument has far-reaching implications for the standard of compliance with the CSA. If one considers that the IAEA's mandate is to determine not only the correctness, but also the completeness of the declaration, the IAEA has the authority, nay, the *obligation* to conduct additional inspections to those called for under the INFCIRC/153 itself, in order to determine, with any confidence, that there are no undeclared fissile materials. This is the argument of the West and the IAEA, as to the IAEA's mandate. And so the argument goes that, with this standard and the mandate of the IAEA, Iran has not provided enough cooperation to satisfy suspicions regarding past and possibly current nuclear weapons-related activity in Iran.²²

Under the tenure of Director General Yukiya Amano, the IAEA has accepted from national intelligence agencies, information regarding not only Iran's use of fissile material itself, but also information concerning the other elements of building a nuclear weapon, essentially meaning the physical construction of a nuclear warhead. In November 2011, the Director General of the IAEA produced a report to the BOG laying out the evidence the IAEA had obtained from the national intelligence sources, that it argued raised the specter of Iran having engaged in a number of industrial and

²¹ See IAEA, *The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on Non-Proliferation of Nuclear Weapons*, Bd. of Gov., IAEA Doc. INFCIRC/153 (June 1972), <http://www.iaea.org/Publications/Documents/Infircs/Others/infirc153.pdf>.

²² IAEA, *Council on Foreign Relations (CFR) Interview with Albert Carnesale*, IAEA Doc. CFR Interview 091110 (Nov. 9, 2010), <http://www.iaea.org/newscenter/transcripts/2010/cfr091110.html>.

scientific experiments, the understanding from which could be used in the development of a nuclear warhead.²³

This adds yet another dimension to the legal arguments of the West and the IAEA regarding Iran's compliance with international nuclear law—the possibility of an Article II breach of the NPT.²⁴

In summary, the West and the IAEA argue that Iran is in breach of its CSA obligations, which in turn links to Article III of the NPT. Second, the West and the IAEA argue that there is a possible military dimension of Iran's nuclear program that raises the specter of an Article II violation of the NPT.

The U.N. Security Council, as I noted, in Resolution 1696 and subsequent resolutions, has commanded Iran to cease uranium enrichment.²⁵ This then, becomes yet another dimension of international law relevant to this case—i.e. the legally binding force of Security Council resolutions under Articles 25 and 103 of the U.N. Charter.²⁶

IRAN'S RESPONSES AND AFFIRMATIVE ARGUMENTS

Let's switch now to Iran's legal arguments, which are responsive in some respects to the West's accusations, and in other respects, rest on independent assertions Iran's legal arguments are essentially based in Article IV of the NPT—the inalienable right of all states to peaceful uses of nuclear energy.²⁷ I wrote a book, published in 2011, probably half of which is devoted to interpretation of Article IV and Article III and this whole question of the inalienable right.²⁸ I will only mention here that we need not think of

²³ IAEA, *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, Rep. of Dir. Gen., IAEA Doc. GOV/2011/65 (Nov. 8, 2011), <http://www.iaea.org/Publications/Documents/Board/2011/gov2011-65.pdf>.

²⁴ See NPT, *supra* note 20, at art. II.

²⁵ S.C. Res. 1696, ¶ 2, U.N. Doc. S/RES/1696 (July 31, 2006).

²⁶ U.N. Charter arts. 25, 103.

²⁷ NPT, *supra* note 20, at art. IV.

²⁸ DANIEL H. JOYNER, *INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY* (2011).

the right to the full nuclear fuel cycle as residing only in the NPT. Under the *Lotus* principle of international law, according to which, essentially, that which is not prohibited by law is lawful, the real question is: are the activities related to the fuel nuclear cycle prohibited anywhere in international law?²⁹ And the answer to this is no, except in very specific ways in the context of Article II of the NPT, and to some extent, Article III and the safeguards requirement of the IAEA. So that's an important change of vision to look at it that way. A right need not exist under the NPT. Instead, the proper determination would be whether any activities are prohibited in international law, and if they are not, then they are lawful. Thus, Iran argues, its NPT Article IV right to peaceful uses of nuclear energy provides the essential starting point for legal analysis.³⁰

Iran specifically disputes the argument by the West and the IAEA that Iran is in noncompliance with its IAEA CSA on a number of bases. One is the question of the mandate of the IAEA. Iran, in viewing the INFCIRC/153 Comprehensive Safeguards Agreement, sees the mandate of the IAEA spelled out very clearly in Article II, and that is to detect the diversion of fissile materials from peaceful to military uses.³¹ It essentially argues that the framework provided by the CSA, is that detecting diversion of fissile material is to be accomplished through a declaration by the State Party of its fissile materials and facilities, and then the IAEA's determination of the accuracy of that declaration.³² Iran argues that anything beyond that – including the imposition of a higher level of cooperation than that contained in the CSA; or the idea that the IAEA has a mandate not only to determine the accuracy but also the completeness of Iran's declaration—is *ultra vires* the IAEA's authority under the CSA.³³

²⁹ See S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, <http://documents.law.yale.edu/sites/default/files/SS%20Lotus%20-%20PCIJ%20-%201927.pdf>.

³⁰ H.E. Ambassador A.A. Soltanieh, Statement to the Second Session of the Preparatory Committee of the 2015 NPT Review Conference (Apr. 23, 2013), at 4, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom13/statements/23April_Iran.pdf.

³¹ See *id.* at 4-5.

³² See *id.* at 3.

³³ See *id.*

Essentially, Iran argues that if the IAEA is accorded the mandate of determining not only the accuracy but also the completeness of a declaration, then a NPT NNWS would be required to prove the negative—i.e. to prove that Iran does not have undeclared fissile materials; to prove that Iran has never engaged in possible military dimensions; and to prove that it is logically impossible for Iran to do so.³⁴ How can one prove that one has not done something? It is a basic principle of logic - that you cannot prove the negative. It is a never-ending game that produces only time and argument. Based on this point, Iran argues that it is in compliance with its IAEA CSA.

In response to the possible military dimensions legal angle, Iran argues that, again, under the CSA, there is no mandate for the IAEA to investigate or to assess potential nuclear weapons-related work not directly relating to diversion of fissile material from peaceful to military uses. Furthermore, with regard to NPT Article II, they argue that the NPT does not prohibit research, design, or industrial capabilities that could be used to make a nuclear warhead, but that could be used for other things as well. They point to Japan, in particular, as a state that has every industrial and technical capability to build a nuclear weapon, and thus has every capability outlined in the November 2011 IAEA report on Implementation of Iran's Safeguards Agreement. And yet, there have been no arguments by the West or the IAEA that Japan is in noncompliance with its safeguards agreement or in violation of the NPT. In summary, Iran argues that it is in compliance with its IAEA safeguards agreement. Even if it were not in compliance, there would be no NPT Article III breach.

Iran further argues that there is certainly no Article II breach of the NPT. Iran has not manufactured or otherwise acquired nuclear weapons, and, in fact, the IAEA has no mandate to investigate or assess that question.

Iran is essentially correct in its legal arguments regarding NPT interpretation and interpretation of the IAEA's authority and mandate under its statute and its CSA with Iran. According to the

³⁴ *Id.*

correct legal interpretation, Iran is in compliance both with the NPT and with its CSA with the IAEA.

WHAT THE IRAN CASE MEANS FOR THE FUTURE OF THE NPT REGIME

Finally, what does the Iran case mean for the future of the nuclear non-proliferation regime? Iran's case illustrates warped and incorrect legal interpretations of the NPT and of IAEA sources of law and a prejudicial and inconsistent application of the law to this case by the West and by the IAEA itself.

From the macro view, the Iranian case is illustrative of the longstanding and varied policies and practices of the U.S. and its allies, which have fundamentally undermined the NPT legal regime. The NPT was and is a *quid pro quo* grand bargain between nuclear-weapon states and developing NNWS. As the developing NNWS, including but not limited to Iran, feel that the powerful nuclear-weapon states simply disregard their own obligations under the NPT,³⁵ disregard the grand bargain with regard to non-NPT parties,³⁶ and, furthermore, prejudicially and incorrectly use NNWS obligations against them to their harm,³⁷ the treaty regime will fade into further perceived illegitimacy and, ultimately, irrelevance.

The future of the NPT as the normative cornerstone of international law's regulation of nuclear energy is unfortunately bleak. The one most significant reason for this is the warped and prejudicial manner in which the West has generally interpreted and sought to apply the law of the NPT to non-nuclear-weapon states, including Iran. The time has come for a new grand bargain—one that

³⁵ Here, I'm referring specifically to Article VI on disarmament.

³⁶ See *Agreement for Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy (123 Agreement)*, Council on Foreign Relations, Aug. 2007, <http://www.cfr.org/india/agreement-cooperation-between-government-united-states-america-government-india-concerning-peaceful-uses-nuclear-energy-123-agreement/p15459> (discussing the nuclear sharing deal between the U.S. and India).

³⁷ Here is where I would locate the Iran case, such that its leaders no longer feel they are getting the benefit of the grand bargain.

progresses the aim of global nuclear disarmament, as well as strengthens the legal framework governing nonproliferation, while at the same time ensuring that civilian nuclear energy programs may be freely pursued and developed by states that choose to do so.

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VOLUME 2 NO. 2

***CAROLINE* REVISITED: AN IMAGINED EXCHANGE BETWEEN JOHN KERRY AND MOHAMMAD JAVAD ZARIF**

*James W. Houck**

“If you have remonstrated for some time without effect and see no prospect of relief, when begins your right to defend yourself?”¹

Lord Ashburton,
British Minister in America,
July 8, 1842

I. THE NINETEENTH CENTURY STANDARD

Late in the evening of December 29, 1837, a band of British officers conducted a bold raid on the American merchant vessel *Caroline*, which was moored on the Niagara River near Buffalo, New York. After wounding several and killing an American citizen named Amos Durfee, the British set the *Caroline* ablaze, and then adrift. Shortly thereafter, she went over Niagara Falls to a violent demise.

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¹ See Letter from the British Minister to the United States Lord Alexander Baring Ashburton to Secretary of State Daniel Webster, (July 28, 1842), http://avalon.law.yale.edu/19th_century/br-1842d.asp [hereinafter Ashburton Letter].

Within a week, U.S. Secretary of State John Forsyth wrote in protest to Henry Stephen Fox, the British Minister in Washington.² Fox replied that the *Caroline* had been shuttling men, money, and arms to Canadian rebels and that the attack and the *Caroline's* destruction were acts of necessary self-defense.³

The Forsyth-Fox exchange launched a four and one-half year diplomatic, political, and judicial saga that threatened to pull the United States, Great Britain, and Canada, into broader armed conflict. The *Caroline* controversy finally came to rest during the summer of 1842 when U.S. Secretary of State Daniel Webster and British Minister in America Lord Alexander Baring Ashburton exchanged three letters destined for legal history.⁴

In his first letter, Webster wrote that the *Caroline* attack was “a wrong, and an offense to the sovereignty and the dignity of the United States”⁵ Reiterating his comments from an earlier letter, Webster famously placed the burden on Great Britain to show: “[U]pon what state of facts, and what rules of national law, the destruction of the *Caroline* is to be defended. It will be for that Government to show a necessity of self-defen[s]e, instant,

² See *British-American Diplomacy: The Caroline Case*, THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited October 30, 2013).

³ See *id.*

⁴ See Letter from Secretary of State Daniel Webster to British Minister to the United States Lord Alexander Baring Ashburton (July 27, 1842), http://avalon.law.yale.edu/19th_century/br-1842d.asp [hereinafter Webster Letter #1]. See also Ashburton Letter, *supra* note 1; Letter from Secretary of State Daniel Webster to British Minister to the United States, Lord Alexander Baring Ashburton (Aug 6, 1842), http://avalon.law.yale.edu/19th_century/br-1842d.asp [hereinafter Webster Letter #2]. Although the final Webster-Ashburton exchange is best known, it actually culminated a multi-author correspondence through the years 1838-1842. Others who exchanged letters throughout the *Caroline* affair included Secretary of State John Forsyth, British Foreign Secretary Lord Palmerston, British Minister in Washington Henry S. Fox, and American Minister to the United Kingdom Andrew Stevenson.

⁵ Webster Letter #1, *supra* note 4.

overwhelming, leaving no choice of means, and no moment for deliberation.”⁶

Ashburton quickly replied, affirming that the two statesmen were “perfectly agreed as to the general principles of international law applicable to this unfortunate case.”⁷ Ashburton disagreed with Webster, however, on the application of the principle to the facts before them and also posed a fundamental question:

[I]f cannon are moving and setting up in a battery which can reach you and are actually destroying life and property by their fire, if you have remonstrated for some time without effect and see no prospect of relief, when begins your right to defend yourself . . . ?⁸

Ashburton had no doubt of the answer: the attack on the *Caroline* was a necessary and justified act of self-defense.⁹

The *Caroline* letters’ lasting effect on international law has been profound. Through their exchange, Webster and Ashburton established a principle that has assumed an important place in the international legal canon: a nation need not stand passively by while another prepares to launch an attack. Their failure to agree on the principle’s application to the facts before them, however, foreshadowed a challenge that has vexed diplomats and scholars in successive conflicts to this day.

One wonders if the parties in the *Caroline* matter might have averted bloodshed, destruction, and affronts to national honor had they been able to negotiate with the *Caroline* principle in mind *before* the attack. We can only speculate. Once the water (and vessel) was over the dam, so to speak, the parties may have been constrained by immutable facts and found it politically difficult to compromise their respective positions.

⁶ *Id.*

⁷ Ashburton Letter, *supra* note 1.

⁸ *Id.*

⁹ *See id.*

framing the current protagonists' radically different perspectives, both of which are critical for an informed understanding of today's crisis. Short of an actual public dialogue about the use of force, there is no better way to capture the competing arguments than to imagine a 21st century letter exchange between the United States' Secretary of State and the Iranian Foreign Minister.

II. A TWENTY FIRST CENTURY IMAGINED EXCHANGE

July 19, 2013

From John Kerry, Secretary of State of the United States of America to Mohammad Javad Zarif, Foreign Minister of the Islamic Republic of Iran:

Despite years of effort, the international community has been unable to persuade your government to be forthcoming on critical aspects of your uranium enrichment program. Given this impasse, the United States must now ensure you do not misunderstand how the international community and the United States view our vital interests.

As always, the United States continues to seek resolution of this matter in accord with current United Nations Security Council resolutions and the Non-Proliferation Treaty regime, which fully account for Iran's right to develop and operate a nuclear energy program for peaceful purposes.¹² However, absent resolution in accordance with these agreements, we view the Iranian nuclear program with grave concern. Your government's willingness to flaunt the existing international safeguards regime¹³ has been, and remains, unacceptable. Today, the United States is unable to confirm the status of either your nuclear enrichment program or any related

¹² See Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

¹³ See IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, Rep. of the Dir. Gen., ¶ 32, IAEA Doc. GOV/2003/40 (June 6, 2003), <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-40.pdf>. ("Iran has failed to meet its obligations under its Safeguards Agreement with respect to the reporting of nuclear material, the subsequent processing and use of that material and the declaration of facilities where the material was stored and processed.").

military development you may have undertaken. Your government could put the world at ease simply by allowing IAEA inspectors the access they require and have long sought. Regrettably, your government's actions to date are inconsistent even with agreements you have already signed.

In the absence of such assurances, the United States is left with no choice but to assume the Islamic Republic of Iran is developing a nuclear weapon that may be launched without warning. As more time passes without required access and disclosure, the international community is increasingly threatened and options for resolution are narrowing.

I call upon your government to comply with existing Security Council resolutions and your obligations under the Nuclear Non-Proliferation Treaty and related Safeguard Agreements. I am willing to meet with you personally to discuss further details, as this may be our last, best hope. Thank you for your attention to these concerns.

July 29, 2013

From Minister Zarif to Secretary Kerry:

Thank you for your letter. The Islamic Republic of Iran is committed to constructive resolution of the issues between us. I respectfully submit, however, that if there is a crisis, it is brought about by the United States' refusal to respect the sovereign right of the Islamic Republic to develop nuclear energy for peaceful purposes, a right which is expressly permitted in the Non-Proliferation Treaty.

Iran might be more receptive to your concerns if they were not so self-serving. You have nuclear weapons with enough destructive power to destroy the world within hours. Indeed, you provided the best evidence of their power by annihilating Hiroshima and Nagasaki.

You seem quite willing to accept the "unacceptable" from other nations when your interests dictate. Other nations that actually possess nuclear weapons have not joined the Non-Proliferation Treaty and some have even declared their intention to use nuclear

weapons against you.¹⁴ Yet, you remain fixated on the Islamic Republic. The government of Iran can only conclude that your concerns arise not from your fear of nuclear weapons, but, rather, from your fear of an assertive Islamic state.

The Islamic Republic will not be threatened or bullied. We will continue our peaceful nuclear program without your permission, supervision, or interference. I remain hopeful that your current administration will walk away from the United States' traditional approach vis-à-vis my country. Confrontation certainly is not the way.

August 9, 2013

Secretary Kerry to Minister Zarif:

In response to your letter of [45 days before JLIA], let me reassure the people of Iran that the United States has no quarrel with Islam nor any desire to interfere with a peaceful and transparent nuclear energy program that complies with international safeguards. You must understand, however, that Iran's assurances alone cannot provide the sole basis for its neighbors' security. The following facts are well known to you, but are recounted here to ensure there is no doubt about why your government's actions are viewed with such grave concern by the entire international community.

In 2002, the IAEA substantiated allegations that the Islamic Republic conducted secret nuclear activities. When the IAEA requested additional access to Iran's nuclear facilities, your government refused. In 2007, rather than provide required disclosure, your government announced instead that you would no longer adhere to the Additional Protocol to your IAEA safeguards agreement.¹⁵ Your government has consistently failed to notify the

¹⁴ See *Nuclear Weapons: Who Has What?*, CNN.COM, <http://www.cnn.com/interactive/2013/03/world/nuclear-weapon-states/> (last visited Aug. 29, 2013). See also *Nuclear Nonproliferation Treaty*, U.S. Department of State, <http://www.state.gov/t/isn/npt/> (last visited Aug. 29, 2013).

¹⁵ See IAEA, *supra* note 10, at ¶ 49 ("Iran is not implementing its Additional Protocol. The Agency will not be in a position to provide credible assurance about the absence of undeclared nuclear material and activities in Iran unless and until Iran provides the necessary cooperation with the Agency . . .").

IAEA of nuclear reactor design information and of your decision to enrich uranium to 20 percent uranium-235.¹⁶ Finally, in February 2006, the IAEA Board of Governors was forced to refer the matter of Iran's non-compliance to the United Nations Security Council.¹⁷

Since becoming seized of the issue, the Security Council has passed six resolutions demanding compliance with the Islamic Republic of Iran's IAEA safeguards agreements.¹⁸ Resolution 1696 demanded that your government suspend all enrichment-related and reprocessing activities.¹⁹ When your government failed to comply, the Security Council passed Resolution 1737, making IAEA compliance mandatory and imposing sanctions that banned the supply of nuclear-related materials and technology and froze assets of key individuals and companies.²⁰ These sanctions were later expanded in four subsequent Security Council resolutions.²¹ In addition, the European Union has imposed restrictions of its own.²² Finally, as a sign of both the United States' resolve and abiding desire to settle this matter peacefully, our Congress passed the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA)²³ in the hope that the Islamic Republic would respond sensibly.

¹⁶ See *id.* at ¶ 51.

¹⁷ See *id.* at ¶ 2 n.3.

¹⁸ See S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

¹⁹ S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006).

²⁰ See S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

²¹ See S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

²² See European Union: Restrictive Measures (Sanctions) in Force, updated Feb. 21, 2013, http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

²³ Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312, <http://www.gpo.gov/fdsys/pkg/PLAW-111publ195/pdf/PLAW-111publ195.pdf>.

Your government's record of obfuscation and delay on nuclear matters is especially alarming in light of its recent history. The world remembers your government's role in the 444-day American Embassy hostage crisis, the 1983 bombing of Marine Barracks in Beirut that killed 299, the 1992 attack on the Israeli Embassy in Buenos Aires that killed 29 and injured another 242, as well as its consistent support of Hezbollah.²⁴

Your government's consistent refusal to abide by IAEA regulations and U.N. Security Council Resolutions and its well-documented history of state-sponsored terrorism provides no confidence that Iran is enriching uranium solely for peaceful purposes or that your government will show restraint if it acquires a nuclear weapon.²⁵ Iran's conduct, both past and present, is creating an immediate threat that, as I noted in my letter of [55 days before JLIA], is rapidly narrowing options for resolution. Accordingly, the United States calls on the Islamic Republic of Iran yet again to take the required verifiable steps before it is too late.

August 19, 2013

Minister Zarif to Secretary Kerry:

The Islamic Republic cannot accept the threats implicit in your correspondence. You lecture us about international law, but you

²⁴ See CASEY L. ADDIS & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., R41446, HEZBOLLAH: BACKGROUND AND ISSUES FOR CONGRESS (2011), <http://www.fas.org/sgp/crs/mideast/R41446.pdf> (noting the strong connection between Iran and Hezbollah). See also U.S. Dep't of Def., Report of the DoD Commission on Beirut International Airport Terrorist Act, October 23, 1983, <http://www.fas.org/irp/threat/beirut-1983.pdf> (noting that Hezbollah is considered a terrorist organization according to the U.S. Department of State and is on the Foreign Terrorist Organization and Specially Designated Terrorist lists); U.S. Department of Defense, Imposition of Sanctions With Respect to the Financial Sector of Iran, Section 1245 of the FY2012 National Defense Authorization Act, Jan. 2012 (stating that Iran financially supports international terrorism and proliferation).

²⁵ See Marcus George, *Iran has new rocket site, ballistic missile tests possible: report*, REUTERS, Aug. 8, 2013, <http://www.reuters.com/article/2013/08/08/us-iran-space-idUSBRE9770A920130808?feedType=RSS&feedName=worldNews> (noting that Iran has constructed a rocket site that may be used for ballistic missiles).

know that a preemptive attack would be a gross violation of international law. The United Nations Charter prohibits states from using armed force in self-defense unless “an armed attack occurs.”²⁶ Given that Iran has not, and will not, attack anyone first, you would be acting illegally in express violation of the Charter. Your own scholars have said as much.²⁷

Furthermore, the International Court of Justice has ruled that the mere possession of nuclear weapons does not violate the Charter or general principles of international law.²⁸ Thus, even if Iran did possess nuclear weapons, any attack would be blatant aggression.

As a peace-loving nation, Iran hopes you will abandon any further consideration of an illegal, immoral, and foolish preemptive strike.

August 29, 2013

Secretary Kerry to Minister Zarif:

I am encouraged by your mention of international law. If we act within international law, our chances for a satisfactory solution increase. Our discussion of international law must, however, be accurate and complete. Article 51 simply reaffirmed the right nations already possessed: the inherent right of self-defense. Article 51 includes not only the right to *respond* to an armed attack, but also the

²⁶ See U.N. Charter art. 2, para. 4 (stating: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”). See also U.N. Charter art. 51 (stating: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed occurs against a Member of the United Nations . . .”).

²⁷ See Mary Ellen O’Connell & Maria Alveras-Chen, *The Ban on the Bomb—And Bombing: Iran, the U.S., and the International Law of Self-Defense*, 57 SYRACUSE L. REV. 497, 497 (2007) (“The use of force [against Iran] should ‘come off the table,’ as diplomats search for a constructive way forward.”).

²⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

inherent right to *prevent* an imminent attack.²⁹ A nation's right to defend itself through preventative measures is well established when circumstances present an immediate threat and no alternative means are available for guaranteeing the safety of its people or territorial integrity. Your ability to launch a nuclear weapon at a regional target without detection would present such a threat to our allies as well as U.S. citizens and property lawfully in the region.

September 9, 2013

Minister Zarif to Secretary Kerry:

Your position on the preemptive use of force is intriguing, particularly given that the Islamic Republic has lived in the shadow of nuclear weapons, most notably those possessed by the United States and Israel, for many years. If Iran were so inclined, we could apply your criteria as justification to strike each of your nations. Obviously, we have not.

Iran would never execute a policy that has already been deemed illegal by the international community. Have you forgotten how the United States, and the rest of the world, condemned Israel's attack on the Iraqi nuclear program in 1981?³⁰ Have you forgotten the 2005 World Summit, where the General Assembly, including the United States, reaffirmed the Charter's text and with it, the principle that unilateral first use of force outside the express text of the Charter is not permitted?³¹

²⁹ The French text of Article 51 refers to "le droit naturel," that is, "the natural right." Charte des Nations Unies art. 51. This is a very expansive view of preemptive action, permitting more preemptive attacks than the U.N. Charter.

³⁰ See S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (Jun. 19, 1981) (stating that the Security Council "strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct . . .").

³¹ See 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 79, U.N. Doc A/RES/60/1 (Sept. 16, 2005) (stating: "We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the

Likewise, Iran would never execute a policy that is based on so many flawed premises. Preemptive attacks rely on suppositions, which, in turn, depend on information and intelligence that may be wrong. Recall how your country invaded Iraq based on the false intelligence that Iraq posed “a continuing threat to the national security of the United States [by] continuing to possess and develop significant chemical and biological weapons.”³² Recall how your predecessor, General Colin Powell, lectured the United Nations Security Council in 2003, claiming that Saddam Hussein was concealing weapons of mass destruction.³³ As the world has since learned, your information was either grossly mistaken or deliberately misleading. In either case, your misplaced invasion led to needless suffering and death. Your calamity in Iraq shows the folly of substituting paranoia and deception for actual facts.

For all these reasons, Iran will never attack first, and we categorically deny your right to do so. Iran has shown discipline and patience in the face of an actual, as opposed to imaginary, threat. Iran has chosen the path of peace over the path of mob violence. However, do not be mistaken: the Islamic Republic will defend itself if you are so foolish as to launch an armed attack first. Your bombers will fall from the sky, your ships will sink, and your sailors and soldiers will die. If the deaths of your young people are an insufficient deterrent, know also you will watch your gas lines grow, your freeways lie empty, and your fading economy wither even more quickly. Most ironically, your attack will be wasted because our nuclear facilities are invulnerable. If you attack them, you will fail.

September 13, 2013

Secretary Kerry to Minister Zarif:

Your most recent letter is deeply disappointing. Even so, because the stakes are so high, I invite you, on behalf of the President

Charter.”) This is important as Article 51 of the U.N. Charter only permits military action in self-defense “if an armed attack occurs.”

³² Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

³³ Colin Powell, U.S. Sec’y of State, Presentation to the U.N. Security Council on the U.S. Case Against Iraq (Feb. 6, 2003), <http://www.cnn.com/2003/US/02/05/sprj.irq.powell.transcript>.

of the United States, to meet with me in Geneva as soon as possible to continue this discussion. I extend this offer in good faith and in the sincere hope that we might yet find a way to preserve the peace. I look forward to your reply.³⁴

III. ASSESSING THE EXCHANGE

Aside from demonstrating that “fantasy diplomacy” is as intractable as real diplomacy, who has the better legal argument?³⁵

As the imagined Zarif letter suggests, some international lawyers would argue that nothing would justify a preemptive strike on Iranian nuclear capabilities.³⁶ They argue that possession of nuclear

³⁴ See Thomas Erdbrink, *Iran's New President Calls for Nuclear Talks Without Rejecting Direct U.S. Role*, N.Y. TIMES, Aug. 6 2013, <http://www.nytimes.com/2013/08/07/world/middleeast/irans-new-president-says-nuclear-talks-could-succeed.html?partner=rss&emc=rss&r=0> (noting that Iran's new President, Hassan Rouhani, has called for serious negotiations with the United States on Iran's nuclear program but calling for the United States to take the first step).

³⁵ Some contend that legal arguments contribute little to the use of force debate. See, e.g., Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 717 (2005) (“[Some] see the rules on the use of force embedded in the [U.N.] Charter as completely devoid of any legally significant normative value.”). See also Jeremy Rabkin, *American Self-Defense Shouldn't Be Too Distracted by International Law*, 30 HARV. J.L. & PUB. POL'Y 31, 43 (“When one appeals to higher claims . . . one should keep in mind that among the very highest claims is the claim of the people to security.”).

³⁶ See YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE, 199, para. 525 (5th ed. 2011) (“U.N. Member States are barred by the Charter from exercising self-defense[] in response to a mere threat of force”). See also THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1422, para. 50 (Bruno Simma et al. eds., 3d ed. 2012) (“[A]n anticipatory right of self-defence would be contrary to the wording of Art. 51 (‘if an armed attack occurs’). . .”); Rep. of the U.N. Secretary-General's High-level Panel on Threats, Challenges, and Change, *A more secure world: Our shared responsibility*, ¶ 190, U.N. Doc. A/59/565 (Dec. 2, 2004), <http://www.un.org/secureworld/report.pdf> (“If there are good arguments for preventative military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”); Murphy, *supra* note 35, at 708 (stating that some “hew[] closely to the language of Article 51. . . . Neither anticipatory self-defense nor preemptive self-defense can be lawful because such forms of self-defense envisage action prior to an armed attack actually occurring.”).

weapons, *per se*, does not violate international law, that the U.N. Charter permits the use of force only in response to an armed attack, and, that the Security Council (including the United States) has condemned past acts of preemption against nuclear programs. Within this view, force is permitted only if Iran launches a nuclear attack; although, some may acknowledge the necessity of preemptive force in rare circumstances. Concerned that endorsing any aspect of the preemption doctrine would encourage its use, this group would ban the first use of force but rely on the international community to judge the circumstances of an attack in hindsight, and impose severe or minimal sanctions as appropriate.³⁷

Another group, in the Webster-Ashburton tradition, would allow anticipatory force against an enemy who is clearly preparing to attack. This view requires evidence that the attack be “imminent,” i.e., that the potential target state demonstrates that its adversary is making tangible preparations to attack and that the only way to prevent the impending attack is to damage or destroy the adversary’s capability to launch the attack.³⁸

Despite the differences in these legal positions, neither position would justify an attack on Iran today.³⁹ As the imagined Kerry letters suggest, these legal restrictions leave some uneasy, including the actual leaders of the United States and Israel. To the extent the Obama Administration has discussed the issue publicly, official statements have described the potential Iranian threat not as “imminent,” but “existential.”⁴⁰ While “existential” has not been

³⁷ See ANTONIO CASSESE, INTERNATIONAL LAW 310-11, quoted in Murphy, *supra* note 35, at 711.

³⁸ See Murphy, *supra* note 35, at 711-15.

³⁹ See Cristian DeFrancia, *Enforcing The Nuclear Nonproliferation Regime: The Legality of Preventative Measures*, 45 VAND. J. TRANSNAT’L L. 705, 780 (2012) (“The concept of an ‘imminent’ attack remains confined in nineteenth century conceptions, as articulated in the *Caroline* case.”). See also Gregory E. Maggs, *How the United States Might Justify a Preemptive Strike on a Rogue Nation’s Nuclear Weapon Development Facilities under the U.N. Charter*, 57 SYRACUSE L. REV. 465, 476-78 (2007) (arguing that the *Caroline* case does not justify an attack on nuclear capabilities).

⁴⁰ See Ron Kampeas, *Obama Tells U.N.: Nuclear Iran poses existential threat to Israel*, JTA (Sept. 25, 2012, 3:24 PM), <http://www.jta.org/news/article/2012/09/25/3107926/obama-nuclear-iran->

precisely defined in this context,⁴¹ it seems intended to capture the increased diplomatic leverage a nuclear-armed Iran would enjoy as well as the possibility that Iran might feel emboldened to act more aggressively, either directly or as a state-sponsor, under cover of a nuclear umbrella.

As unsettling as the proposal of a nuclear-armed Iran may be, a hostile state's possession of nuclear weapons capability has never been sufficiently threatening, per se, to prompt a preemptive armed attack by an opposing state. Aside from Israel's strikes on Iraq and Syria, which elicited varying degrees of condemnation from the international community,⁴² the closest example is the U.S. blockade of Cuba (or "quarantine," as it was called) during the Cuban Missile Crisis. These events contrast with decades of restraint by the Soviet Union and the United States vis-à-vis each other, as well as other mutual adversaries confirmed or believed to have nuclear weapons. To date, the Obama Administration has done little to compare or distinguish these precedents.

[poses-existential-threat-to-israel](#) (quoting President Obama as saying, "Make no mistake, a nuclear-armed Iran is not a challenge that can be contained. It would threaten the elimination of Israel, the security of Gulf nations and the stability of the global economy."). See also *Weighing Benefits and Costs of Military Action Against Iran*, THE IRAN PROJECT 42 (Sept. 13, 2012), <http://www.scribd.com/doc/106806148/IranReport-092412-Final#fullscreen> (noting that Prime Minister Netanyahu describes a nuclear-capable Iran as an "existential threat" and many members of the U.S. Congress and other political leaders agree with the Israeli position); Ivo H. Daalder, *Beyond Preemption: An Overview*, in BEYOND PREEMPTION: FORCE AND LEGITIMACY IN A CHANGING WORLD 1, 8 (Ivo H. Daalder ed., 2007) (stating "the very possession of weapons of mass destruction by some countries can pose an existential threat, whether or not their actual use is truly imminent.").

⁴¹ Israel typically defines "existential" as meaning a threat to Israel as a nation-state.

⁴² Israel's attack on the Iraqi facilities at Orsak was widely condemned. See *supra* note 30. But see Andrew Garwood-Gowers, *Israel's Airstrikes on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?*, 16 J. CONFLICT & SECURITY L. 263, 290 (2011) ("Israel's failure to offer any legal justification for its airstrike, and the muted international reaction to the Al-Kibar episode, appear to be part of a recent trend in state practice indicating a broader lack of concern over the legality of relatively minor uses of force.").

To be fair, the timing is not good for the Obama Administration to engage in detailed justifications for using force against Iran. In addition to the potentially toxic effect such discussion might have on ongoing negotiations, it could highlight potential differences between the United States and Israel regarding the appropriate threshold for using preemptive force, undermining whatever deterrent value the current vaguely defined threat may provide. In addition, there are undoubtedly military and intelligence capability issues the Obama Administration is unwilling to discuss publicly. Reticence is understandable, at least for the moment. Ultimately, however, if anticipatory self-defense as traditionally understood is insufficient to protect against the “existential” Iranian threat, the President might reasonably be expected to offer a more precise rationale and afford Congress the opportunity to consider the issue as well.

Even if the Iranian crisis abates, questions surrounding the use of preemptive force against weapons of mass destruction are likely to persist, and any complete analysis will implicate three fundamental questions. First, does a state or non-state actor have the capability to use a nuclear weapon? Second, does the potential nuclear actor have a strong propensity to use the weapon? Third, at what point does a potential target state lose its capability to prevent the weapon’s use?

The answers to each of these questions have important implications for the use of preemptive force, and traditional *Caroline* analysis has tended to focus predominantly on the first two. If an actor has the *capability* to use force, then the actor’s *intent* becomes critical. In traditional conflict scenarios, knowing an actor’s intent may be difficult, but the limited destructive capacity of the actor’s capability will often make erring on the side of caution an acceptable risk. To a large degree, traditional international law adopts this approach.⁴³ However, when the capability portends mass destruction, the risk calculation changes and the third factor above becomes especially relevant.

⁴³ See Barry E. Carter & Allen S. Weiner, INTERNATIONAL LAW, 931-1083 (6th ed. 2011).

In the contemporary Iranian context, the third question is this: given the ultimate difficulty of knowing Iranian *intent*, at what point does Iran's *capability* to deliver a weapon of mass destruction exceed the United States' or Israel's *capability* to prevent the weapon's use? Given uncertainty about both Iran's intent and capability, when does the United States or Israeli capability-based window of prevention close, thereby creating an unacceptable risk given the first two uncertainties?

This question raises a series of subordinate questions. For example, will a potential target state know *where* an attack will originate? If yes, will the target state know *when* the attack will originate? If yes, will the target state have sufficient *reaction time* to respond? If yes, will the target state have sufficient *capability* of its own to respond? If the answer to each of these questions is confidently and consistently yes, then the justification for a preemptive strike is presumably reduced. The potential target state can wait, *Caroline* style, for indications that a real-time attack is about to begin and put a stop to it.

If, however, the answer to any of the questions above is something less than a confident and consistent yes, are policymakers in the potential target state required to rest and accept the risk that an adversary will be able to launch an attack that cannot be stopped? If the answer is yes, then the inquiry ends. If, however, the answer is no, and we are unwilling to mandate that states (and their inhabitants) accept the resulting risk, we must challenge the classic understanding of self-defense and revisit *Caroline*.

IV. REVISITING *CAROLINE*

Revisiting *Caroline* in the context of Iran's alleged pursuit of nuclear weapons requires another series of questions. If a potential target state is not confident in its ability to prevent a possible nuclear weapons attack, is it at least confident in its ability to locate and destroy a weapon after it has been created but before an attack sequence is imminent. If so, then a revised *Caroline* doctrine might justify a preemptive strike on the weapon itself. If, however, the potential target state lacks confidence in its ability to destroy the weapon in its crib, is the target state able to prevent the weapon from

being built by stopping or impeding development of one or more of its critical components, i.e., the fissile material, the nuclear trigger, or the delivery system? If so, is this the last, best, objective chance to ensure a nuclear attack will not occur? Is this where the potential nuclear aggressor's activities are best illuminated and least dangerous? If so, should a potential target state be permitted to take action before this window of maximum insight and minimal danger closes?

Asking these questions in the current Iranian context does not assume the answers. The United States or Israel may well have the ability to prevent Iran's "imminent" use of a nuclear weapon as imminence is understood in the traditional *Caroline* context. If a potential target state has confidence that it can destroy the weapon immediately before launch, then the potential target state ought arguably to wait for that moment to give transparency or disarmament the fullest opportunity. If, however, an earlier preemptive attack is the last realistic chance before the preemption window closes, should international law deny the right to use preemptive force?⁴⁴

There are a host of potential responses. Diplomacy may be more effective if states do not have a sanctioned "off ramp" to use force; states operating in bad faith may manipulate a preemptive right;⁴⁵ and, states operating in good faith may make honest mistakes about the other side's intentions or capabilities. Each of these responses is plausible, but none answers the ultimate question: what does a nation do, after negotiating unsuccessfully and in good faith, to defend itself or an ally against a catastrophic threat its elected leaders reasonably and honestly believe may occur?

In the age of terror and potential mass destruction, the answer cannot be to negotiate tirelessly, accept the risk, and hope for

⁴⁴ Cf. *Weighing Benefits and Costs of Military Action Against Iran*, *supra* note 40, at 42, 8, 29 (concluding that the United States would have at least a month to make a military decision once Iran makes a "dash for the bomb" and that a military strike would delay Iran's ability to build a nuclear weapon "for up to four years").

⁴⁵ See 1986: U.S. Launches Air Strikes on Libya, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/april/15/newsid_3975000/3975455.stm (noting that the 1986 Libya incident was an instance of one state provoking the threat and then used it to justify the exercise of force).

the best. Likewise, the answer cannot be to ignore international law: to assume that the United States may impose its will oblivious to both the constraints and legitimizing power of international law in the 21st century is naïve and dangerous. Ultimately, however, a ban on preemptive action—however aspirational and legally pristine—does not meet the needs of officials charged with protecting actual populations.⁴⁶ International legal theory notwithstanding, an official facing a perceived threat that poses an unacceptable risk will act to defeat it.⁴⁷ In light of this reality, is it not preferable to provide criteria

⁴⁶ See, e.g., President John F. Kennedy, Radio and Television Address to the American People on the Soviet Arms Build-up in Cuba (Oct. 22, 1962), <http://www.jfklibrary.org/Asset-Viewer/sUVMCh-sB0moLfrBcaHaSg.aspx> (“We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace”). See also Transcript of the Interview at the World Economic Forum in Davos, The Clinton Foundation, January 27, 2005, <http://www.youtube.com/watch?v=SLqEQyyVNzI&t=1658> (quoting President Clinton: “Everybody talks about what the Israelis did at Osirak in 1981, which, I think, in retrospect, was a really good thing. You know, it kept Saddam from developing nuclear power”); THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 13-16 (2002), <http://www.state.gov/documents/organization/63562.pdf> (claiming that the President must prevent nations that assist terrorists from possessing nuclear weapons). This position was reiterated in: WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006).

⁴⁷ See Daniel Joyner, *Jus Ad Bellum In The Age of WMD Proliferation*, 40 GEO. WASH. INT’L L. REV. 233, 247 (2008) (“[A]t the heart of the current crisis in international use of force law is a continuing, and likely increasing gap between the provisions of existing law and the perceptions of a significant number of important states of realities of the international political issue area that law is meant to regulate - a classic gap between law and reality caused by the law simply lagging behind the dynamics of technological and geo-political change.”). See also Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770, 773 (2012) (“There is little intersection between the academic debate and the operational realities. . . . The reality of the threats, the consequences of inaction, and the challenges of . . . operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states. This situation is unsatisfactory. Particularly in this area of law, it is important that principle is sensitive to the practical realities of the circumstances that it addresses”) Sir Daniel Bethlehem QC was the former

to guide decision-making before conflict occurs? If conflict does occur, is it not preferable to have criteria available to enhance the objectivity, and thereby, the credibility of post-hoc accountability assessments? To deny the right of preemptive self-defense is to create a dangerous vacuum: a legal doctrine so restrictive that nations cannot realistically comply creates a category of potential actions that are prospectively ungoverned and retrospectively standard-less.

It is easier to justify a right to preemption in theory than to develop a set of workable criteria upon which to measure whether a particular use of force is justified. This difficulty, however, should not deter continued attempts to perfect preemptive criteria. Sir Daniel Bethlehem and Professor Matthew Waxman have made recent, substantial efforts in this regard. Bethlehem stresses factors such as:

... (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense. . .⁴⁸

Professor Waxman notes factors such as the exhaustion of peaceful alternatives, the unacceptable risk of losing the opportunity to eradicate the threat, the magnitude of the threat, and the consistency with the purposes of the U.N. Charter.⁴⁹

principal legal advisor of the U.K. Foreign & Commonwealth Office from May 2006 to May 2011; ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242 (1994) (“[I]n a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself.”); Matthew C. Waxman, *The Use of Force Against States That Might Have Weapons of Mass Destruction*, 31 MICH. J. INT’L L. 1, 49 (2009) (“The vitality of the law governing precautionary self-defense is dependent upon the ability of this law to adapt to contemporary challenges. . . . in a manner that decision-makers and security professionals perceive as sensible.”).

⁴⁸ See Bethlehem, *supra* note 47, at 775.

⁴⁹ See Waxman, *supra* note 47, at 28.

An obvious place to start, and possibly develop the preemption criteria, is with the parties who hold the information indispensable for resolving disputes: the state and non-state actors who raise suspicions about their capabilities and intentions through their failure to cooperate with transparency regimes. Here too, a host of objections might be raised. To begin, the NPT allows countries to develop nuclear energy and then withdraw to build weapons; does not require the big five nations to reduce their nuclear weapons;⁵⁰ and has no mechanisms to enforce and penalize nations for withdrawing or violating the treaty. One might add to the list the inherent difficulty of a suspected state proving a negative.

Regardless how one evaluates these particular objections to the status quo, the international community must do more to resolve the standoff between states who violate international transparency standards and states contemplating the use of preemptive force against those potentially in possession of weapons of mass destruction.⁵¹ A party's violation of rigorously vetted transparency norms—whether status quo or progressively developed in the future—should be expressly included in the calculation of revised *Caroline* criteria.

When Daniel Webster and Lord Ashburton were making legal history through their exchange of letters, ships were built from wood, combatants wore uniforms, and lethality was measured by the range of a smooth bore cannon shot. The world has changed. When diplomacy fails in the current era—one characterized by terrorism, non-state actors, and the potential for mass destruction—nations must have legal authority to remove threats before they are fulfilled. Preemptive actions must be governed by criteria carefully drawn to

⁵⁰ Although the NPT does not require reductions of nuclear weapons from the big five nation signatories, Article VI encourages them to actively consider making such moves. ("Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.").

⁵¹ See, e.g., O'Connell, *supra* note 27, at 498 ("Iran is obligated under international law to comply with Council resolutions. By the same token, those states concerned with Iran's nuclear program must also comply with international law and its prohibition on the use of force in how they respond to Iran.").

redefine our understanding of *Caroline's* “no choice of means, no moment for deliberation,”⁵² in the face of the extraordinary risks posed by weapons of mass destruction in the age of terror.

The development of a set of preemption criteria is difficult but essential. To say otherwise means the law remains silent in the face of a potentially dangerous actor who would develop, possess, and possibly use a massively destructive weapon. Until states like Iran are willing to offer more cooperation in demonstrating they are not “actual” threats, such states can expect others to consider them “existential” threats with the risk that entails for all concerned.

Penn State Journal of Law & International Affairs

2013

VOLUME 2 NO. 2

THE PROHIBITION ON THE USE OF FORCE FOR ARMS CONTROL: THE CASE OF IRAN'S NUCLEAR PROGRAM

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In many discussions of Iran's nuclear program, there seems to be an implicit assumption that states have a right to use military force to end the program. For example, the Institute for National Security Studies,¹ an Israeli think tank, in an article titled, *The Legality of an Attack against Iranian Nuclear Facilities*, places emphasis on proving the necessity of an attack as a last resort but fails to indicate any accepted legal basis for resort to military force as an initial matter.² In fact, international law does not permit the use of military force without United Nations Security Council authorization for arms control of any kind, whether to end a nuclear program, to end a chemical weapons program, or to prevent missile shipments.

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¹ See INSTITUTE FOR NATIONAL SECURITY STUDIES, <http://www.inss.org.il> (last visited Aug. 29, 2013).

² Robbie Sabel, *The Legality of an Attack against Iranian Nuclear Facilities*, 345 INSS INSIGHT 1 (2012), [http://www.inss.org.il/cdn.reblaze.com/upload/\(FILE\)1339738543.pdf](http://www.inss.org.il/cdn.reblaze.com/upload/(FILE)1339738543.pdf).

INTERNATIONAL LAW ON THE USE OF MILITARY FORCE

At the very heart of the international legal system is Article 2(4) of the United Nations Charter.³ Article 2(4) generally prohibits the use of military force in international relations. It has only two express exceptions in the Charter and one implied exception in general international law. Expressly, states may use force under the terms of Article 51 in self-defense if an armed attack occurs.⁴ States may also use force if the U.N. Security Council authorizes it.⁵ Finally, some argue that, under customary international law, a state may use military force when invited by a government to assist in ending an insurgency.⁶ In 2001, the United States took the position that Afghanistan's Taliban government was legally responsible for actions by Al Qaeda so that, under the law of self-defense, the United States had the right to use military force in Afghanistan following the 9/11 attacks. The use of force in self-defense in Afghanistan, however, ended in 2002 when a *loya jirga* of prominent Afghans selected Hamid

³ U.N. Charter art. 2, para. 4 states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

⁴ U.N. Charter art. 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

⁵ U.N. Charter art. 39 states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Articles 41 and 42 state in part: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions [I]t may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security"

⁶ See Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 191-92 (1986), <http://bybil.oxfordjournals.org/content/56/1/189.full.pdf+html>.

Karzai to be Afghanistan's leader.⁷ Since then the U.S. has been fighting at the invitation of President Karzai.

Despite the fact that many in U.S. international security circles overlook these legal obligations, they remain the law. In 2005, the United Nations Charter provisions on the use of force were reconfirmed by all U.N. member states at the World Summit in New York. In 2010, states provided another show of support for Article 2(4) when a definition of the crime of aggression was formally added to the Rome Statute of the International Criminal Court (I.C.C.).⁸ In adding to the I.C.C.'s jurisdiction, the 122 states party to the Rome Statute indirectly confirmed their support for Article 2(4). Any serious violation of Article 2(4) is an act of aggression for which a national leader could face individual criminal responsibility.⁹

Even where a state has a right to use force based on self-defense, Security Council authorization, or invitation, the state resorting to force must also comply with any applicable rules of state responsibility,¹⁰ as well as the general principles of necessity¹¹ and

⁷ See Carlotta Gall & James Dao, *A Buoyant Karzai Is Sworn In as Afghanistan's Leader*, N.Y. TIMES, June 20, 2002, <http://www.nytimes.com/2002/06/20/world/a-buoyant-karzai-is-sworn-in-as-afghanistan-s-leader.html>. See also Mary Ellen O'Connell, *Remarks: The Resort to Drones under International Law*, 39 DENV. J. INT'L L. & POL'Y 585, 592 (2011).

⁸ See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, <http://treaties.un.org/doc/publication/UNTS/Volume%202187/v2187.pdf>.

⁹ See Amendments to the Rome Statute on the International Criminal Court, Jun. 11, 2010, C.N.651.2010.TREATIES-8 (Depositary Notification), <http://treaties.un.org/doc/publication/CN/2010/CN.651.2010-Eng.pdf>. See also Mary Ellen O'Connell & Mirakmal Niyazmatov, *What is Aggression? Comparing the Jus Ad Bellum and the ICC Statute*, 10 J. INT'L CRIM. JUST. 189 (2012).

¹⁰ On the law of state responsibility generally, see G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/83&Lang=E and G.A. Res. 56/49, U.N. Doc. A/RES/56/49 (Jan. 22, 2002), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/49&Lang=E. See also JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002).

¹¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter *Legality of the Threat or Use of Nuclear*].

proportionality.¹² Given these restrictions on the right to resort to force, the Israeli scholar Yoram Dinstein is correct when he says, “U.N. member states are barred by the Charter from exercising self-defense in response to a mere threat of force.”¹³ The possession or development of weapons, even weapons of mass destruction, cannot be classified as anything more than a threat.

APPLYING THE RULES ON THE USE OF FORCE TO
ATTACKING IRAN

Soon after the adoption of the U.N. Charter, it might have been conceivable that the world would classify the possession of nuclear weapons as more than a threat. Such possession could have been deemed in law to be an armed attack. While conceivable, the plain fact is that the world has not concluded that the development or possession of nuclear weapons is the equivalent of an armed attack.

Many experts suspect that Iran is intent on developing nuclear weapons. Concerns have existed for many years, but were heightened in April 2013 when Iran announced that it planned to install advanced centrifuges and a production unit at Natanz.¹⁴ A February 13, 2013 report published by the Wisconsin Project’s Iran Watch,¹⁵ estimates, on the basis of data supplied by the International

Weapons]. See also *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*].

¹² See *Nicaragua*, *supra* note 11, at ¶ 176 (noting the requirements under customary international law of necessity and proportionality when using self-defense). See also Georg Nolte, *Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer*, 24 EUR. J. INT’L L. 283 (2013).

¹³ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 199, para. 525 (5th ed. 2011).

¹⁴ See Yeganeh Torbati & Fredrik Dahl, *Iran Announces Uranium Mining After Nuclear Talks Fail*, REUTERS, Apr. 9, 2013, <http://www.reuters.com/article/2013/04/09/us-iran-nuclear-idUSBRE93804L20130409>.

¹⁵ See Wisconsin Project on Nuclear Arms Control, *About Iran Watch*, IRAN WATCH, <http://www.iranwatch.org/about-us> (last visited Aug. 29, 2013) (“The Wisconsin Project carries out research and public education designed to stop the spread of nuclear weapons, chemical/biological weapons and long-range missiles.”).

Atomic Energy Agency, that “[b]y using the approximately 9,000 centrifuges operating at its Natanz Fuel Enrichment Plant, Iran could theoretically produce enough weapon-grade uranium to fuel a single nuclear warhead in about 1.5 months.”¹⁶ Iran denies that it is developing nuclear weapons; it claims to be developing a domestic power source.¹⁷ With respect to resort to military force, however, neither the development nor the possession of nuclear weapons is classified as an armed attack sufficient to trigger the right of self-defense under Article 51 of the U.N. Charter.

In its 1996 advisory opinion, the *Legality of the Threat or the Use of Nuclear Weapons*, the International Court of Justice said this about the possession of nuclear weapons:

It does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of certain provisions of the Second Hague Declaration of 1899, the Regulations annexed to The Hague Convention IV of 1907 or the 1925 Geneva Protocol. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. But the Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction; and observes that, although, in the last two decades, a great many negotiations have been conducted regarding nuclear weapons, they have not resulted in a treaty of general

¹⁶ Wisconsin Project on Nuclear Arms Control, *Iran's Nuclear Timetable*, IRAN WATCH (May 24, 2013), <http://www.iranwatch.org/ourpubs/articles/iranuclear timetable.html>. See also Iran 'has tripled' uranium-enriching centrifuges at Natanz plant, RT NEWS (published Apr. 17, 2013, 19:54), <http://rt.com/news/iran-nuclear-centrifuges-natanz-016/>.

¹⁷ See Islamic Republic of Iran Ministry of Foreign Affairs, *Basic Facts About Iran's Peaceful Nuclear Activities*, THE EMBASSY OF THE ISLAMIC REPUBLIC OF IRAN IN OSLO, <http://iranembassy.no/en/6.htm> (last visited Aug. 29, 2013) (discussing the Report issued by the Iranian Embassy in Oslo regarding the reality of Iran's nuclear program).

prohibition of the same kind as for bacteriological and chemical weapons.¹⁸

If the Security Council were to authorize the use of force to stop Iran's nuclear program, states using force would not need to prove that development or possession of nuclear weapons amounted to an armed attack. These states would have to show, however, that using force would be a last resort and could succeed in ending Iran's program or possession of weapons.¹⁹ The International Court of Justice in its 2003 Oil Platforms case, brought by Iran against the United States for unlawful attacks, said:

[I]n order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. As the Court observed in the case concerning Military and Paramilitary Activities in and against Nicaragua, it is necessary to distinguish "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms," since "[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack."²⁰

Moreover, the states using force would need to show that the cost of using force—in terms of persons killed and property

¹⁸ Legality of the Threat or Use of Nuclear Weapons, *supra* note 11, at ¶¶ 49-73 (discussing rules on the lawfulness or unlawfulness of nuclear weapons as such).

¹⁹ See Mary Ellen O'Connell & Maria Alevras-Chen, *The Ban On the Bomb-and Bombing: Iran, the U.S., and the International Law of Self-Defense*, 57 SYRACUSE L. REV. 497, 509-13 (2007).

²⁰ Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 51 (Nov. 6) (quoting, in part, Nicaragua, *supra* note 11, at ¶¶ 191, 195).

destroyed—did not outweigh the value of the military objective. When a state resorts to the use of force, especially in populated areas, it should be limited to the minimum force needed to accomplish the military objective without the loss of life.

Israel has used military force on several occasions to control weapons developments and shipments. It attacked Iraq in 1981, Sudan in 2009, Syria in September 2007 and again in January and May 2013.²¹ In the 2007 Syrian case, Israel sent eight fighter jets to bomb a factory site. Allegedly, Syria was cooperating with North Korea in the construction of a secret weapons production facility. It was only days after the bombing that Syria protested. Syria likely did not protest sooner because it did not wish to draw attention to its illicit activities.²² The situation could be analogized to an unclean hands finding—courts will not hear the claims of a plaintiff when the plaintiff has committed a wrong of its own in the matter. Despite the muted protests, the 2007 incident did not result in any change to the binding terms of the U.N. Charter prohibiting the use of force. Other attacks by Israel have resulted in greater levels of criticism and condemnation.

In addition to the lack of legal basis to attack a state for arms control purposes, any attack on Iran would likely fail to meet the requirements of necessity and proportionality. While some speculate that attacking Iran could end the nuclear program, plenty of experts doubt this outcome and even speculate that attacking Iran will induce the Iranians to accelerate the program or divert it from energy production to weapons production.²³ Moreover, any use of military force in Iran will result in widespread death, injury, and destruction.²⁴ It is well known that the nuclear sites are scattered throughout the

²¹ See *Timeline: Israeli attacks on Syrian targets*, AL JAZEERA (last modified May 5, 2013, 17:53), <http://www.aljazeera.com/indepth/features/2013/05/20135512739431489.html>.

²² See Mary Ellen O'Connell, *Affirming the Ban on Bombing Iran*, SYRACUSE L. REV. (2012), <http://www.law.syr.edu/student-life/publications/law-review/iran-nuclear-symposium/mary-ellen-oconnell.aspx>.

²³ See *Attacking or Threatening Iran Makes No Sense (Key Points)*, AMERICAN FOREIGN POLICY PROJECT, <http://americanforeignpolicy.org/military-option-iran/attacking-iran> (last visited Aug. 29, 2013).

²⁴ *Id.*

country and are underground with people living near areas that might be affected. Further, attacking Iran in these circumstances would result in giving Iran the right to counter-attack. Other states would have the legal right to come to its aid in collective self-defense. Attacking Iran could result in yet another destructive war in Western Asia and the Middle East, even as the Iraq War drags on, and instability and violence plague nations in the midst of the transition known as the Arab Spring.

MEASURES SHORT OF FORCE AGAINST IRAN'S NUCLEAR PROGRAM

What about measures short of the use of armed force such as economic sanctions or cyberattacks such as the Stuxnet worm? Such measures are prohibited in the first instance under the principle of non-intervention but could be permissible if imposed by the U.N. Security Council or as countermeasures if the conditions for countermeasures are met.

The United Nations Security Council has imposed sanctions on Iran, and these are generally lawful.²⁵ The United States and the European Union, however, have more questionable sanctions programs in place.²⁶ The United States and Israel have also, apparently, used a computer virus to attack Iran, which is difficult to justify under international law.²⁷ Stuxnet caused centrifuges in Iran's

²⁵ See Press Release, Security Council, Security Council Imposes Sanctions on Iran for Failure to Halt Uranium Enrichment, Unanimously Adopting Resolution 1737 (2006), U.N. Press Release SC/8928 (Dec. 23, 2006), <http://www.un.org/News/Press/docs/2006/sc8928.doc.htm>. See also Press Release, Security Council, Security Council Imposes Additional Sanctions on Iran, Voting 12 in Favour to 2 Against, with 1 Abstention, U.N. Press Release SC/9948 (June 9, 2010) (adopting Security Council Resolution 1929 (2010)), <http://www.un.org/News/Press/docs/2010/sc9948.doc.htm>.

²⁶ See Reuters, *U.S. senators seek to block Iran from billion-dollar reserves*, AL ARABIYA (last updated May 9, 2013, KSA 09:02–GMT 06:02), <http://english.alarabiya.net/en/business/economy/2013/05/09/US-senators-seek-to-block-Iran-from-billion-dollar-reserves.html>.

²⁷ For a good account of the possible involvement of the U.S. and Israel in the use of the Stuxnet worm against Iran, see DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* 197-209 (2012).

nuclear facilities to turn far more rapidly than appropriate.²⁸ As will be discussed below, to be lawful, Stuxnet, like unilateral economic sanctions, would have to meet the rules governing countermeasures. Both attempts to pressure Iran fall short of those rules.

Countermeasures are mechanisms allowed under international law for states to carry out self-help, coercive enforcement of their rights. Self-help plays a larger role in international law enforcement given the absence at the international level of both a central police force and compulsory judicial body. In the *Gabčíkovo- Nagymaros* case,²⁹ the International Court of Justice laid down four elements of a lawful countermeasure:

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. . . .

. . . [T]he injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. . . .

. . . [T]he effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question. . . .

. . . .

. . . [I]ts purpose must be to induce the wrongdoing state to comply with its obligations under international law, and the measure must therefore be reversible.³⁰

If a state is a victim of an international law violation and it has clear and convincing evidence that the wrongful act is attributable to a foreign sovereign state, the victim state may itself commit a wrong, so long as it is commensurate with the initial wrongful act

²⁸ See *id.* See also Mary Ellen O'Connell, *Cyber Security Without Cyber War*, 17 J. CONFLICT & SEC. L. 187, 194 (2012).

²⁹ *Gabčíkovo-Nagymaros Project* (Hung./Slov.), 1997 I.C.J. 7 (Sept. 25).

³⁰ *Id.* at ¶¶ 83-87.

(proportionality) and the response is aimed at inducing an end to the initial wrong (necessity) or the provision of damages. In the Stuxnet case, if the United States and Israel released the worm, they are the states that committed the wrong, not Iran.³¹ Therefore, it was an unlawful, disproportionate countermeasure because forty percent of the computers it affected were not in Iran. Moreover, the worm has been reverse-engineered and is now a weapon in the hands of criminals. Finally, the worm could not have been intended to prevent the wrongdoing.

The Security Council has the right to impose sanctions on Iran as it has for many years, but the U.S. does not have the right to act unilaterally beyond discretionary areas of activity, such as the provision of aid. Imposing sanctions on individuals, corporations, or states that do not adhere to unilateral U.S. demands violates a variety of international legal principles, *inter alia*, due process, property rights of individuals, and the principle of non-intervention in the case of interference with sovereign state activities. It is important to draw a distinction between Security Council sanctions and unilateral sanctions by individual states because the former's purpose is to modify behavior, not punish; whereas, the latter seeks to punish states and to compel them to act in a certain manner. A unilateral sanction would not only be unlawful, but also inefficient in Iran's case as it will hamper a diplomatic resolution to the situation. The U.S. recently targeted companies that are accused of evading sanctions imposed on Iran, and according to some reports, imposed financial penalties "on an Iranian businessman, a Malaysian bank and a network of companies it accused of attempting to evade

³¹ The one wrong that Iran has committed is failure to comply with Security Council resolutions against it. The Security Council has not authorized the U.S. and Israel to take measures to respond to that wrong. The U.S. and Israel claim Iran has violated an International Atomic Energy Agency Safeguards agreement. Again, even if that is correct, the Security Council is addressing Iran's nuclear activities, meaning the U.S. and Israel have no independent right to take enforcement action unilaterally. *See* S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

international sanctions on Iran's nuclear program through money laundering."³²

Flynt Leverett has assessed U.S. sanctions against Iran, concluding:

I've had any number of Iranians, official and otherwise, say this to me—that sanctions, in some ways, actually help Iran, in that they give the government a kind of political cover to take some steps toward what you might call economic reform, that would be politically difficult otherwise. . . .Iran has done more to expand non-oil exports, it is less dependent on oil revenues for both its government budget and to cover its imports, than any other major oil-exporting country in the Middle East. It has done far more in that kind of diversification than Saudi Arabia or any of the states on the other side of the Persian Gulf . . .³³

Obviously, imposing new economic and diplomatic sanctions will not stop Iran from continuing its nuclear plans. On the contrary, sanctions will only make negotiations more difficult and could make Iran more determined not to comply with U.S.-Israeli demands. With the election of a new Iranian president in mid-2013, Iran indicated a renewed interest in good faith negotiations and greater transparency in disclosing information about its nuclear programs.³⁴

³² Timothy Gardner, *U.S. targets companies accused of evading Iran sanctions*, REUTERS, Apr. 11 2013, <http://www.reuters.com/article/2013/04/12/us-usa-iran-sanctions-idUSBRE93A16Z20130412>.

³³ Flynt Leverett, *The Strategic And Moral Bankruptcy of U.S. Sanctions Policy Toward Iran—Flynt Leverett and Trita Parsi on HuffPost Live*, GOING TO TEHRAN (posted April 16, 2013), <http://goingtotehran.com/the-strategic-and-moral-bankruptcy-of-u-s-sanctions-policy-toward-iran-flynt-leverett-and-trita-parsi-on-huffpost-live>.

³⁴ *Iran's president-elect calls his election victory a mandate for change*, GUARDIAN, June 29, 2013, <http://www.theguardian.com/world/2013/jun/29/iran-president-election-victory>.

Russia takes the same position as Iran. According to the Russian Deputy Foreign Minister Sergei Ryabkov, “Moscow believes that all rights of the Islamic Republic of Iran, including its right to enrich uranium, should be recognized in exchange for its concessions on its nuclear program.”³⁵ Iranian Supreme leader Ayatollah Sayyid Ali Khamenei, said in a statement that the U.S. should recognize Iran’s right to uranium enrichment and that it should stop trying to force them to suspend it if they want a peaceful solution.³⁶

In the first months following the election of Iran’s President Rouhani, the Obama administration indicated renewed interest in achieving a diplomatic solution rather than using military action, which is appropriate; however, it does require affirmative steps toward negotiations. Iran says that it is also open to negotiations. In a statement made by the Head of the Judiciary Ayatollah Sadegh Amoli Larijani, he said that “the path for rational negotiations and rational nuclear dialogues are open and we hope Western countries come to their senses.”³⁷ This may indicate Iran’s willingness to reach a peaceful diplomatic solution without the threats from the United States. Indeed, while talks held in Kazakhstan in April 2013 seemed to yield no positive result,³⁸ the logjam against talks was finally opened. Success in achieving the elimination of Syrian chemical weapons through peaceful means would be an encouraging example of what is possible.

CONCLUSION

The rules of the U.N. Charter were designed to maintain peace in the post-World War II era. No state may resort to the use of

³⁵ *Russia says Iran’s right to enrich uranium should be recognized in a nuclear deal*, TEHRAN TIMES (Apr. 8, 2013, 15:13), <http://www.tehrantimes.com/politics/106651-russia-says-irans-right-to-enrich-uranium-should-be-recognized-in-a-nuclear-deal>.

³⁶ United States Institute of Peace, *Khamenei Open to Direct U.S. Talks*, THE IRAN PRIMER (Mar. 24, 2013, 10:46 PM), <http://iranprimer.usip.org/blog/2013/mar/24/khamenei-open-direct-us-talks>.

³⁷ *Iran News Round Up April 10, 2013*, IRAN TRACKER (Apr. 10, 2013), <http://www.irantracker.org/iran-news-round-april-10-2013>.

³⁸ *See Iran nuclear talks end without progress*, AL JAZEERA, Apr. 6, 2013, <http://www.aljazeera.com/news/middleeast/2013/04/2013442165893529.html>.

force against another state unless it is acting in individual or collective self-defense to an actual armed attack or with Security Council authorization. In addition, all use of force must be necessary and proportionate. Member states of the U.N. have the responsibility to honor the core principles of the U.N. Charter, which are to maintain international peace and security. Attacking Iran is clearly contrary to these obligations. In facing a situation of great concern such as the Iranian nuclear program, Article 33 of the U.N. Charter requires that states resolve disputes peacefully:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.³⁹

³⁹ See U.N. Charter art. 33, paras. 1-2.

Penn State Journal of Law & International Affairs

2013

VOLUME 2 No. 2

HOW PRECIPITOUS A DECLINE?: U.S.-IRANIAN RELATIONS AND THE TRANSITION FROM AMERICAN PRIMACY

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The present essay is grounded in two basic propositions. The first is that the greatest strategic challenge facing the United States is extricating its foreign policy from a well-worn but deeply counterproductive quest for hegemonic dominance in critical areas of the world, especially the Middle East. The second is that Washington's handling of its relations with the Islamic Republic of Iran constitutes a crucial test of America's capacity to put its foreign policy on a more productive and realistic trajectory.

On the first proposition, it has been just a little more than two decades since the United States came out of the Cold War with a multi-faceted supremacy in global affairs like the world had not witnessed for centuries, if not millennia. If one compares where America was just twenty years ago to where it is today, in terms of its ability to achieve its international objectives, it is difficult to avoid the conclusion that the United States is a declining power. It is declining, in part, because of the emergence of new power centers in key regions around the world—China, India, Brazil, Turkey, and even the

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Islamic Republic of Iran itself.¹ It is declining because of an economic “triple whammy” of accumulated debt, eroding infrastructure, and lagging economic growth.² In much of the world, it is also declining because of the perceived culpability in the United States for the global financial crisis of 2007-2009.³ More recently, the

¹ For representative discussion from an already vast and burgeoning literature, see, for example, MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* (2d ed. 2012); ZACHARY KARABELL, *SUPERFUSION: HOW CHINA AND AMERICA BECAME ONE ECONOMY AND WHY THE WORLD'S PROSPERITY DEPENDS ON IT* (2009); CHARLES A. KUPCHAN, *NO ONE'S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN* (2012); KISHORE MAHBUBANI, *THE NEW ASIAN HEMISPHERE: THE IRRESISTIBLE SHIFT OF GLOBAL POWER TO THE EAST* (2008); Flynt Leverett & Pierre Noël, *The New Axis of Oil*, NAT'L INT., Summer 2006; Naazneen Barma, Ely Ratner, & Steven Weber, *Report and Retort: A World Without the West*, NAT'L INT., July-Aug. 2007; Christopher Layne, *The Waning of U.S. Hegemony—Myth or Reality?: A Review Essay*, 34 INT'L SEC. 147, 152-57 (2009); NAT'L INTELLIGENCE COUNCIL, *GLOBAL TRENDS 2025: A TRANSFORMED WORLD* (2008), http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/2025_Global_Trends_Final_Report.pdf; and NAT'L INTELLIGENCE COUNCIL, *GLOBAL TRENDS 2030: ALTERNATIVE WORLDS 16-20* (2012), <http://www.scribd.com/doc/115962650/Global-Trends-2030-Alternative-Worlds>.

² The “triple whammy” metaphor is adapted from Stephen Walt, *The End of the American Era*, NAT'L INT., Nov.-Dec. 2011. See also Flynt Leverett, *Black Is the New Green*, NAT'L INT., Jan-Feb. 2008; DAVID P. CALLEO, *FOLLIES OF POWER: AMERICA'S UNIPOLAR FANTASY* 94-125 (2009); STEPHEN S. COHEN & J. BRADFORD DELONG, *THE END OF INFLUENCE: WHAT HAPPENS WHEN OTHER COUNTRIES HAVE THE MONEY* (2010); MICHAEL MORAN, *THE RECKONING: DEBT, DEMOCRACY, AND THE FUTURE OF AMERICAN POWER* (2012).

³ On the “soft power” costs to the United States of the global financial crisis (from various perspectives), see, for example, the following: Dennis Blair, *Intelligence Community Annual Threat Assessment*, Testimony to the Senate Select Committee on Intelligence, Washington, D.C., Feb. 12, 2009, 2-3, <http://www.intelligence.senate.gov/090212/blair.pdf>; Christopher Layne, *The Unbearable Lightness of Soft Power, in* SOFT POWER AND U.S. FOREIGN POLICY: THEORETICAL, HISTORICAL AND CONTEMPORARY PERSPECTIVES 51, 65-66 (Inderjeet Parmar & Michael Cox, eds., 2010); Susan Aaronson, *Financial Crisis Hurts U.S. Soft Power*, POL'Y INNOVATIONS (Oct. 29, 2008), <http://www.policyinnovations.org/ideas/commentary/data/000090>; Peter Beinart, *How the Financial Crisis Has Undermined U.S. Power*, TIME, June 21, 2010, <http://content.time.com/time/magazine/article/0,9171,1995884,00.html>; and U.S.'s soft power is under challenge, XINHUA, Oct. 20, 2008, http://news.xinhuanet.com/english/2008-10/20/content_10224257.htm.

United States' continuing inability to address its fiscal challenges, either in the short- or long-term, prompted China's Xinhua news agency to editorialize about the need to start "building a de-americanized world."⁴

But on top of these factors, American standing and influence in world affairs is declining because of the failure of American political and policy elites, especially since the end of the Cold War, to define clear, reality-based goals and to relate the diplomatic, economic, and military means at Washington's disposal to realizing them soberly and efficaciously.⁵ In the wake of the Cold War, American policymakers in Democratic and Republican administrations have ignored a key lesson that foreign policy realism, balance of power theory, and an even minimally sensitive reading of international history all teach: while global dominance and hegemony seem nice in theory, in the real world they are unattainable; not even a state as powerful as the United States coming out of the Cold War can achieve them. Moreover, pursuing hegemony actually ends up making a state weaker, by dissipating resources and sparking resistance from others.⁶

In the post-Cold War period, the counterproductive consequences of America's hegemonic strategy have been especially acute in the Middle East. As Flynt Leverett and I note in our book, *Going to Tehran*, the temptations of empire have lured great powers before the United States into what the historian Paul Kennedy

⁴ U.S. *fiscal failure warrants a de-Americanized world*, XINHUA, Oct. 13, 2013, http://news.xinhuanet.com/english/indepth/2013-10/13/c_132794246.htm

⁵ This is the animating theme of Flynt Leverett & Hillary Mann Leverett, *The Balance of Power, Public Goods, and the Lost Art of Grand Strategy: American Policy toward the Persian Gulf and Rising Asia in the 21st Century*, 1 PENN. ST. J.L. & INT'L AFF. 202 (2012).

⁶ See also ANDREW BACEVICH, *THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM* (2008); CALLEO, *supra* note 2, at 1-38; STEPHEN M. WALT, *TAMING AMERICAN POWER: THE GLOBAL RESPONSE TO U.S. PRIMACY* 1-178 (2005); John Mearsheimer, *Structural Realism*, in *INTERNATIONAL RELATIONS THEORIES: DISCIPLINE AND DIVERSITY* (Tim Dunne, Milja Kurki, & Steve Smith eds., 2006); John Mearsheimer, *Imperial By Design*, NAT'L INT., Jan.-Feb. 2011.

famously called “imperial overstretch.”⁷ But America’s post-Cold War imperial turn in the Middle East has arguably set a new record for the largest amount of influence and wealth squandered by a great power in the shortest period of time.⁸

An ill-considered posture toward the Islamic Republic has contributed mightily to Washington’s current strategic predicament in the Middle East. Since the 1979 Iranian Revolution, America’s Iran policy has emphasized three main elements, all grounded in hostility: first, diplomatic isolation; second, economic pressure, largely through sanctions; and third, barely veiled support for regime change in Tehran. This approach has manifestly failed, even on its own terms.⁹ Today, as Flynt Leverett notes in his contribution to this symposium, the United States is a power in relative decline in the region. In contrast, the Islamic Republic, is a rising power.¹⁰ As we will see, continued U.S. hostility toward Iran only courts further and even more precipitous decline in America’s standing and influence in this vital part of the world.

America’s dysfunctional Iran policy also threatens the long-term sustainability of U.S. influence—or, as American policymakers prefer to say, “leadership”—on the global level. Three issues illustrate this dynamic. First, Washington regularly claims that it is the Islamic Republic which endangers the free flow of hydrocarbons from the Persian Gulf to international markets. Today, however, it is America’s efforts to compel Tehran to surrender its developments of indigenous nuclear fuel cycle capabilities by imposing more and more sanctions on the Islamic Republic and through the continuing threat of U.S.-initiated (or Israeli-initiated and U.S.-supported) military action against it—not Iranian behavior—that are the leading threats

⁷ PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000* (1987).

⁸ FLYNT LEVERETT & HILLARY MANN LEVERETT, *GOING TO TEHRAN: WHY THE UNITED STATES MUST COME TO TERMS WITH THE ISLAMIC REPUBLIC OF IRAN* 4 (2013).

⁹ *Id.* at 279-82.

¹⁰ Flynt Leverett, *The Iranian Nuclear Issue, the End of the American Century, and the Future of International Order*, 2 PENN. ST. J. L. & INT’L AFF. 240 (2013).

to the security of Persian Gulf hydrocarbon flows.¹¹ For China and other rising powers dependent on the free flow of Persian Gulf energy supplies to international markets, this raises real questions about America's claim to provide the global public good of international energy security by ensuring the physical security of those supplies.¹²

Second, the expansion of Iran-related secondary sanctions to cover not only investment in Iranian hydrocarbon production but also simple purchases of Iranian crude oil and most non-energy-related transactions with Iran is incentivizing China and other rising powers to develop alternatives to established, U.S.-dominated mechanisms for conducting, financing, and settling international transactions.¹³ This, too, has potentially profound, negative implications for America's international economic leadership.

Third, as Flynt Leverett notes in his contribution to this volume, the larger part of the international community—120 of the U.N.'s 193 member states that are part of the Non-Aligned Movement—are already on record in support of Iran's right to pursue safeguarded enrichment.¹⁴ The ongoing efforts of American administrations unilaterally to rewrite the NPT where Iran is

¹¹ Flynt Leverett & Hillary Mann Leverett, *America's Iran Policy and the Undermining of International Order*, WORLD FIN. REV., July-Aug. 2013, at 38, <http://law.psu.edu/file/TWFR%20Jul-Aug%202013America%20Iran-v2.pdf>.

¹² Discussions with Chinese academics, analysts, and officials, Beijing, China, June 2011, June 2012, and July 2013. See also JOHN GARVER, FLYNT LEVERETT, & HILLARY MANN LEVERETT, MOVING (SLIGHTLY) CLOSER TO IRAN: CHINA'S SHIFTING CALCULUS FOR MANAGING ITS "PERSIAN GULF DILEMMA" 3-17 (2009), http://legacy2.sais-jhu.edu/centers/reischauer/moving_slightly_closer.pdf.

¹³ Leverett & Mann Leverett, *supra* note 5 at 229-30. See also Leverett & Mann Leverett, *supra* note 11, at 40-42; Neelam Deo & Akshay Mathur, *Guest post: BRICS 'Hostage' to west over Iran sanctions, need financial institutions*, FIN. TIMES BLOG (June 27, 2012, 11:05 AM), <http://blogs.ft.com/beyond-brics/2012/06/27/guest-post-brics-hostage-to-west-over-iran-sanctions-need-their-own-financial-institutions/#axzz2ZsLPgSNs>.

¹⁴ Jason Ditz, *Non-Aligned Movement Unanimously Backs Iran's Civilian Nuclear Program*, ANTIWAR.COM (Aug. 31, 2012), <http://news.antiwar.com/2012/08/31/non-aligned-movement-unanimously-backs-irans-civilian-nuclear-program/>; Leverett, *supra* note 10.

concerned is extremely troubling to Brazil, South Africa, Turkey, and other rising powers in the Global South, further undermining the perceived legitimacy of American international “leadership” and feeding a growing unwillingness in much of the world to tolerate such hegemonic assertions by the United States.

On the second of my two basic propositions, Flynt Leverett and I lay out in *Going to Tehran* what is at stake for the United States in its relations with the Islamic Republic of Iran. Just as Washington’s dysfunctional approach toward the Islamic Republic is a crucial element in America’s strategic decline, in the Middle East and globally, America’s capacity to recast its policy toward Iran will be critical to its strategic recovery. In the Middle East, the United States—for its own interests and on classic balance-of-power grounds—needs to pursue strategic rapprochement with the Islamic Republic. On a global level, too, putting America on a more positive and productive strategic trajectory requires a thoroughgoing revision of its Iran policy.

But, as the U.S.-Iranian competition for influence over the Middle East’s regional order intensifies, Washington’s approach to Tehran has grown ever less receptive to serious, strategically-grounded engagement and ever more oriented toward coercive options, including the militarized prevention of Iranian nuclearization and the assertive rollback of Iranian influence. These options raise the risk of another U.S.-initiated war in this vital region. Moreover, by pursuing them, the United States condemns itself to a future as an increasingly flailing, and failing, superpower—and as an obstacle to, rather than a facilitator of, a rules-based international order.¹⁵

I. THE PERILS OF DEMONIZATION

Washington’s antipathy toward the Islamic Republic is grounded in unattractive, but fundamental, aspects of American strategic culture. They include: difficulty accepting independent power centers; hostility to non-liberal states, unless they subordinate their foreign policies to U.S. preferences (as Egypt did under Sadat

¹⁵ Leverett & Mann Leverett, *supra* note 11, at 42.

and Mubarak); and an unreflective but deeply rooted sense that U.S.-backed norms, rules, and transnational decision-making processes are meant to constrain others, not the United States itself.¹⁶

These features of American strategic culture are both conditioned and reinforced by the hegemonic thrust of American foreign policy. In the Middle East, America's imperial turn has prompted it to demonize would-be challengers to its primacy there. One of the more significant manifestations of this practice has been Washington's persistent refusal to understand and accept the basic model underlying Iran's postrevolutionary order—the integration of participatory politics and elections with principles and institutions of Islamic governance and a strong commitment to foreign policy independence.

This refusal has real consequences for America's Iran debate. Instead of recognizing the dysfunctionality of their country's Iran policy and correcting course, American political, policy, and media elites have preferred, and continue to prefer, looking to “regime change”—whether “hard” or “soft”—in Tehran to solve America's Iran problem. To justify such a posture, these elites go on depicting the Islamic Republic as an illegitimate system so despised by its own population as to be in imminent danger of overthrow. American elites have been doing this for more than thirty years, virtually since the Islamic Republic's founding out of the 1979 Iranian Revolution. And for more than thirty years, the Islamic Republic has consistently defied their relentless predictions of its collapse or defeat.¹⁷

The Islamic Republic has survived because its basic model (participatory Islamic governance and foreign policy independence) is—according to polls, electoral participation rates, and other indicators—what a majority of Iranians living inside their country want. They do not want a political order grounded in Western-style secular liberalism. They want an indigenously-generated political order reflecting their cultural and religious values—as the reformist

¹⁶ Flynt Leverett & Hillary Mann Leverett, *Consequences of western intransigence in nuclear diplomacy with Iran*, AL JAZEERA, May 10, 2013, <http://www.aljazeera.com/indepth/opinion/2013/05/2013589151459212.html>.

¹⁷ LEVERETT & MANN LEVERETT, *supra* note 8, at 142-46.

President Mohammad Khatami wrote, “freedom, independence, and progress within the context of both religiosity and national identity.”¹⁸

This was the vision of Grand Ayatollah Seyed Ruhollah Khomeini, the Islamic Republic’s founding father. It is embodied in the Islamic Republic’s constitution; it is what the Islamic Republic, with all its flaws, offers Iranians the chance to pursue, on their own terms. Even most of those Iranians who want the Islamic Republic to evolve in significant ways still want it to be, at the end of the day, the Islamic Republic of Iran.¹⁹ Impressive developmental outcomes since the revolution reinforce Iranians’ sense of the Islamic Republic as a genuinely national project that is theirs to build and own. Under the Islamic Republic, Iran has diversified its economy to a greater extent than any other major oil-exporting country in the Middle East. This means, among other things, that Iran today is less dependent on oil revenues to cover both its government budget and its imports than Saudi Arabia or any of the smaller Gulf Arab monarchies on the other side of the Persian Gulf.²⁰ Contrary to deeply rooted but ill-informed Western stereotypes, the Islamic Republic has achieved far more progressive outcomes in alleviating poverty, delivering health care, providing educational access, and (yes) expanding opportunities for women than the Shah’s regime ever did.²¹

Notwithstanding the Islamic Republic’s staying power, foreign policy pundits who, in many cases, have no direct connection to on-the-ground reality inside Iran continue telling us that the system is on the verge of collapse. This message is reiterated by America’s so-called Iran “experts,” many of whom are Iranian expatriates or Iranian-Americans whose families fled the Revolution

¹⁸ The quote is from “Letter for Tomorrow,” an open letter published by Khatami in May 2004.

¹⁹ LEVERETT & MANN LEVERETT, *supra* note 8, at 177-87.

²⁰ See, for example, the data presented in Mehran Kamrava, *The Political Economy of Rentierism in the Persian Gulf*, in *THE POLITICAL ECONOMY OF THE PERSIAN GULF* 39, 42-47 (Mehran Kamrava, ed., 2012), showing that Iran now covers 50-60 percent of its imports with non-oil exports.

²¹ LEVERETT & MANN LEVERETT, *supra* note 8, at 187-94.

and want to see the Islamic Republic overthrown, perhaps even violently overthrown.²²

A good example of this came in 2009, when, in a collective act of analysis-by-wishful-thinking, American elites widely anticipated a victory by former Prime Minister Mir-Hossein Mousavi over incumbent President Mahmoud Ahmadinejad in that year's Iranian presidential election.²³ Many Western analysts and commentators saw a Mousavi victory as the key to solving America's strategic problems in the Middle East. Some—including senior Obama administration officials—even posited what they called an “Obama effect,” through which the United States would be able to effect “soft” regime change in Iran, achieved much more effectively than through the heavy-handed and overly militarized approach applied by neoconservatives in Iraq.²⁴

When, in June 2009, Ahmadinejad won re-election in the Islamic Republic's presidential contest, American analysts and elites almost universally condemned the outcome as a fraud.²⁵ They did so even though every methodologically sound poll conducted in Iran before and after the election—including polls conducted by Western polling groups (14 polls in all)—showed that Ahmadinejad's re-election with roughly two-thirds of the vote (which is what the official results show that he got) was eminently plausible.²⁶ And

²² See *id.* at 285-326, for a discussion of this point.

²³ *Id.* at 228-31, 232-38.

²⁴ See, e.g., Athena Jones, *Obama Administration Has Eye on Iran*, MSNBC, June 12, 2009; Howard LaFranchi, *Wildcard in Iran Election: Obama*, CHRISTIAN SCI. MONITOR (June 11, 2009), <http://www.csmonitor.com/USA/Foreign-Policy/2009/0611/p06s28-usfp.html>; Paul Brandeis Raushenbush, *The Obama Effect in Iran and Lebanon - Role Model Instead of Straw Man*, HUFFINGTON POST, June 8, 2009, http://www.huffingtonpost.com/paul-raushenbush/the-obama-effect-in-iran_b_212399.html; Michael Slackman, *Hopeful Signs for U.S. in Lebanon Vote*, N.Y. TIMES, June 8, 2011, http://www.nytimes.com/2009/06/09/world/middleeast/09lebanon.html?_r=0; Simon Tisdall, *Lebanon Feels the Obama Effect*, GUARDIAN, June 8, 2009, <http://www.theguardian.com/commentisfree/2009/jun/08/lebanon-elections-obama-effect>.

²⁵ LEVERETT & MANN LEVERETT, *supra* note 8, at 231-32.

²⁶ *Id.* at 238-43. On Iranian public opinion in connection with the Islamic Republic's 2009 presidential election, see also Ben Katcher, *LIVE*

American elites embraced a narrative of election fraud even though neither Mousavi nor anyone else ever presented any evidence of how the election was stolen.²⁷ This never-demonstrated but fervently-espoused narrative also conditioned American and Western elites' romanticization of the Green Movement, widely portrayed in the West as a mass popular uprising poised to sweep away the Islamic Republic, perhaps within just a few months. But it was evident to anyone prepared to look soberly at reality that, even at its height, the Green Movement did not represent anything close to a majority of Iranians and that, within a week of the June 2009 election, the movement's social base was already contracting.²⁸

STREAM: What Does the Iranian Public Really Think?, RACE FOR IRAN (Feb. 3, 2010), <http://www.raceforiran.com/live-stream-what-does-the-iranian-public-really-think>; Steven Kull et al., *An Analysis of Multiple Polls of the Iranian Public: The June 12 Election, The Perceived Legitimacy of the Regime, and the Nature of the Opposition*, WORLDPUBLICOPINION.ORG (Feb. 3, 2010), http://www.worldpublicopinion.org/pipa/pdf/feb10/IranElection_Feb10_rpt.pdf; Steven Kull et al., *An Analysis of Multiple Polls Finds Little Evidence Iranian Public Finds Government Illegitimate*, WORLDPUBLICOPINION.ORG (Feb. 3, 2010), <http://worldpublicopinion.org/pipa/articles/brmiddleeastnafricara/652.php?lb=brme&pnt=652&nid=&id=>; SEYED MOHAMMAD MARANDI, EBRAHIM MOHSENI, AND MAHMOUD SALAHI, MARDOM VA ENTEKHABAT DAHOM [PEOPLE AND THE TENTH ELECTIONS] (2012).

²⁷ LEVERETT & MANN LEVERETT, *supra* note 8, at 245-56. On the election, see also Flynt Leverett & Hillary Mann Leverett, Op-Ed., *Ahmadinejad won. Get over it*, POLITICO (June 15, 2009), <http://www.politico.com/news/stories/0609/23745.html>; Flynt Leverett, Hillary Mann Leverett, & Seyed Mohammad Marandi, *Will Iran be President Obama's Iraq?*, POLITICO (June 24, 2009), <http://www.politico.com/news/stories/0609/24099.html>; Eric Brill, *Did Mahmoud Ahmadinejad Steal the 2009 Iran Election?*, RACE FOR IRAN (June 11, 2010), <http://www.raceforiran.com/wp-content/uploads/2010/06/IranArticle-060110/pdf>; Reza Esfandiari and Yousef Bozorgmehr, *A Rejoinder to the Chatham House Report on Iran's 2009 Presidential Election Offering a New Analysis of the Results*, in Flynt Leverett & Hillary Mann Leverett, *Persistent (and Game-Changing) Myths: Iran's 2009 Presidential Election, One Year Later*, RACE FOR IRAN (June 11, 2010), <http://www.raceforiran.com/persistent-and-game-changing-myths-iran%E2%80%99s-2009-presidential-election-one-year-later>.

²⁸ LEVERETT & MANN LEVERETT, *supra* note 8, at 259-72. On the Green movement, see also Flynt Leverett & Hillary Mann Leverett, Op-Ed., *Another Iranian Revolution? Not Likely*, N.Y. TIMES, Jan. 5, 2010, http://www.nytimes.com/2010/01/06/opinion/06leverett.html?_r=1&.

And yet the myth of the Islamic Republic's illegitimacy and instability did not die as a result of the Green movement's failure. Indeed, it got a new lease on life in early 2011, when the Arab Awakening began. Through the pro-Green lens that continues to shape most Western commentary on Iranian politics, it seemed inevitable that the waves of popular discontent breaking across the Arab world would soon engulf the Iranian government. Most of the pundits who had jumped on the regime-change bandwagon in 2009 hopped back on for another ride.

On February 20, 2011, billionaire financier George Soros, appearing on CNN's *GPS* with Fareed Zakaria, offered a bet that "the Iranian regime will not be there in a year's time."²⁹ Two days later, in *Foreign Policy*, Flynt Leverett and I took Soros up on his wager.³⁰ We even bet that not only would the Islamic Republic still be Iran's government in a year's time but that the balance of influence and power in the Middle East would be tilted even further in its favor. More than two years have elapsed since Soros made his wager; we are eager to collect on it.

Today the myth of the Islamic Republic's illegitimacy and fragility comes in two interlocking versions: one, that sanctions are now finally "working" to undermine the Islamic Republic's basic stability; and two, that the Arab Awakening has left the Islamic Republic isolated in its own neighborhood.

On sanctions, Flynt Leverett and I made our most recent visit to Iran in October 2013. No one who has walked the streets of Tehran recently, as we did, seen that Iran's economy is not collapsing, and talked with a range of Iranians living in Iran could possibly think that sanctions are "working" in a way that will compel either the Islamic Republic's implosion or its surrender to American demands on the nuclear issue. There is no constituency—among conservatives, reformists, or even what is left of the Green

²⁹ Fareed Zakaria GPS, *Interview with George Soros*, CNN (Feb. 20, 2011), <http://transcripts.cnn.com/TRANSCRIPTS/1102/20/fzgps.01.html>.

³⁰ Flynt Leverett & Hillary Mann Leverett, *Obama Is Helping Iran*, FOREIGN POL'Y (Feb. 23, 2011), http://www.foreignpolicy.com/articles/2011/02/23/obama_is_helping_iran.

Movement—prepared to accept such an outcome. Those arguing to the contrary have never explained why Iran’s economy is so much worse that it was in the 1980s, when the Islamic Republic lost half its GDP while defending itself in its eight-year war with Iraq—and yet, even then, its population did not rise up to force fundamental change or concessions to hostile powers.

Indeed, there is no precedent *anywhere* for a sanctioned population mobilizing to overthrow its government and replace it with one that would adopt the policies preferred by the sanctioning foreign power.³¹ In the Iranian case, moreover, the Islamic Republic has over years demonstrated its capacity to adapt dynamically to sanctions, in ways that do not just stave off collapse but, in some instances, actually benefit its economy.³²

³¹ Even in Iraq, where severe sanctions were imposed for over a decade, killing more than one million Iraqis (half of them children), the population did not rise up to overthrow Saddam Hussein. In the end, Saddam was displaced only by a U.S. invasion—and, even after that, Iraqis did not set up a pro-American, secular, liberal government ready to subordinate Iraq’s sovereignty and national rights to Washington’s preferences. For critical discussion of Western commentators’ exaggerated claims about sanctions’ impact on popular attitudes and official decision-making in the Islamic Republic, see Flynt Leverett & Hillary Mann Leverett, *Time to Face the Truth About Iran*, THE NATION, Feb. 25, 2013, <http://www.agenceglobal.com/index.php?show=article&Tid=2965>, MIDDLE EAST ONLINE, <http://www.middle-east-online.com/english/?id=56911>; Sune Engel Rasmussen, *Tight Times in the Grand Bazaar*, FOREIGN POL’Y (Jan. 16, 2013), http://www.foreignpolicy.com/articles/2013/01/16/sanctions_iran_daily_life; Djavad Salehi-Isfahani, *Understanding the Rial’s Freefall*, LOBE LOG FOREIGN POL’Y (Oct. 4, 2012), <http://www.lobelog.com/understanding-the-rials-freefall/>; and Djavad Salehi-Isfahani, *Is Iranian Hyperinflation a Mirage?*, AL-MONITOR (Jan. 23, 201), <http://www.al-monitor.com/pulse/originals/2013/01/hyperinflation-iran-manti-teo.html>.

³² See, e.g., LEVERETT & MANN LEVERETT, *supra* note 8, at 281 (discussing how sanctions can encourage greater self-sufficiency in Iran, citing how, in response to the 2010 enactment of U.S. secondary sanctions targeting gasoline exports to Iran, the Islamic Republic accelerated the expansion of its refining capacity to a point that, in 2011, it became a net exporter of gasoline, with Afghanistan as one of its biggest customers); Leverett & Mann Leverett, *supra* note 30 (discussing how the realignment of the *rial*’s nominal value with its real value has boosted Iran’s non-oil exports); William Yong & Alireza Hajihosseini, *Understanding Iran Under Sanctions*, OXFORD ENERGY COMMENT FROM THE OXFORD INSTITUTE FOR ENERGY STUDIES (Jan. 2013), <http://www.oxfordenergy.org/wpcms/wp->

Recently, some commentators have claimed that Hassan Rohani's victory in the Islamic Republic's 2013 presidential election proves U.S.-instigated sanctions are finally "working" by fueling popular discontent with nuclear policies that have prompted escalating international pressure. Such discontent supposedly drove Iranians to elect a candidate inclined to cut concessionary deals with the West. This "analysis," badly misreads Rohani's views on the nuclear issue.³³ Furthermore, a close examination of the 2013 presidential election—including, once again, analyses of high-quality polling data from methodologically-sound surveys—demonstrates that, in fact, it was not sanctions but a functioning political system that worked to produce Rohani's election.³⁴

On the Arab Awakening, the same pundits who say that sanctions are working advise Americans and others to embrace the logic-defying proposition that the same political and social currents that deposed pro-American leaders in Tunisia and Egypt and are empowering Islamists in countries across the Arab world will, in Iran, somehow transform the Islamic Republic into a secular liberal state. This is truly analysis-by-wishful-thinking. In Tehran, policymakers and analysts see the Arab Awakening as hugely positive for the Islamic Republic's regional position. They judge—correctly, in my view—that any Arab government which becomes more representative of its people's beliefs, concerns, and preferences will, virtually by definition, become less enthusiastic about strategic

content/uploads/2013/01/Understanding-Iran-Under-Sanctions-Oil-and-the-National-Budget.pdf.

³³ See Flynt Leverett & Hillary Mann Leverett, *How Washington Should Engage Iran's New President*, HUFFINGTON POST, June 17, 2013, http://www.huffingtonpost.com/flynt-and-hillary-mann-leverett/iran-new-president_b_3456007.html; Flynt Leverett & Hillary Mann Leverett, *What Rouhani's Election Should Mean For Washington*, THE HINDU, June 18, 2013, <http://www.thehindu.com/opinion/lead/what-rouhanis-election-should-mean-for-washington/article4823926.ece>.

³⁴ Flynt Leverett, Hillary Mann Leverett, & Seyed Mohammad Marandi, Op-Ed., *Rouhani won the Iranian election. Get over it*, AL JAZEERA, June 16, 2013, <http://www.aljazeera.com/indepth/opinion/2013/06/201361681527394374.html>.

cooperation with the United States, let alone Israel, and more open to the Islamic Republic's message of foreign policy independence.³⁵

More particularly, over the last two and a half years Washington commentators have regularly intoned that, because of the Arab Awakening, Tehran is going to "lose Syria," its "only Arab ally," with "dire consequences" for Iran's regional position and internal stability. These observations underscore how deeply American elites are in denial about basic political and strategic trends in the Middle East. They highlight how slow American elites have been to grasp that, today, the Islamic Republic's most important Arab ally is not Syria, but post-Saddam Iraq the first Arab-led Shi'a state in history, an outcome made possible by the U.S. invasion and occupation. Besides this, Tehran's assessment that Syrian President Bashar al-Assad will not be overthrown—at least not by Syrians—has proven, against Washington pundits' confidently dismissive critiques, correct.³⁶

Looking ahead, any plausibly representative government in Syria will not be more pro-American or pro-Israel than the Assads have been. That is why Tehran has strongly endorsed negotiations between the Assad government and oppositionists aimed at a political settlement; it is oppositionists and their external backers (including the United States) that refuse to deal with Assad. The Islamic Republic strenuously resists the Assad government's replacement by a Taliban-like political structure. But it is external support for opposition forces, in which foreign *jihadis* play an increasingly prominent role, that generates this risk—a risk that, perversely, also threatens the security interests of the United States, which has foolishly called for Assad's removal. Iranian decision-makers—and their allies in Lebanese Hizballah—judge that they are on the right side of history in resisting efforts to use Syrian

³⁵ LEVERETT & MANN LEVERETT, *supra* note 8, at 97.

³⁶ On this point, see also Leverett & Mann Leverett, *supra* note 30.

international legitimacy.³⁹ There will be no United Nations Security Council resolution authorizing such action; growing Russian and Chinese disaffection with the thrust of American Middle East policy and distrust of America's long-term intentions in the region preclude this.⁴⁰ The Non-Aligned Movement is already on record that it would consider an attack on Iran's nuclear facilities illegal; the United States would have no allies for the purpose, save Israel and—perhaps—the United Kingdom.⁴¹

The use of force against the Islamic Republic to destroy non-existent nuclear weapons would ratify America's image, in the Middle East and beyond, as an outlaw superpower. This prospect is even more dangerous to America's strategic position today than it was after the invasion of Iraq in 2003.

Just a few years ago, the United States was effectively still an unchallenged superpower. The views of publics—or even many elites—in most other countries did not matter much to American decision-makers; especially in the Middle East, Washington could usually impose its requirements on compliant governments whose foreign policies were largely unreflective of their own peoples' opinions. Today, as more Middle Eastern publics seek both a larger voice in political processes and greater independence for their nations, their views on regional and international issues matter much more. The utter rejection, internationally and in the United States, of President Obama's publicly announced intention to attack Syrian government targets earlier this year raises a serious question whether—after strategically failed military interventions in

³⁹ Leverett, *supra* note 10; Mary Ellen O'Connell and Reyam El Molla, *The Prohibition on the Use of Force for Arms Control: The Case of Iran's Nuclear Program*, 2 PENN. ST. J. L. & INT'L AFF. 315.

⁴⁰ Multiple discussions with Russian and Chinese officials and analysts since 2006 confirm this point.

⁴¹ Britain's attorney general formally advised Her Majesty's Government in 2012 that a preventive attack on Iran would violate international law; on this basis, London has reportedly declined to support U.S. contingency planning for military strikes against the Islamic Republic. See Nick Hopkins, *Britain rejects US request to use UK Bases in nuclear standoff with Iran*, GUARDIAN, Oct. 25, 2012, <http://www.guardian.co.uk/world/2012/oct/25/uk-reject-us-request-bases-iran>.

Afghanistan, Iraq, and Libya—America can still even credibly threaten the effective use of force in the Middle East.⁴²

In this context, Washington needs better relations with Tehran to save what is left of the U.S. position in the Middle East. At this point in the evolution of the Middle Eastern balance of power, the United States cannot achieve any of its high-priority goals in the region absent a realignment of relations with Tehran. Iran is a critical player for shaping the future not only of Iraq and Afghanistan, but Syria as well. America needs Iranian help to contain the rising tide of *jibadi* terrorism and, more generally, Sunni-instigated sectarian agitation and violence in the region—phenomena fueled by Saudi Arabia and Washington's other ostensible Arab allies in the Persian Gulf. More broadly, U.S. foreign policy must adapt itself to and accommodate the rising demand for participatory Islamist governance in the Middle East. Coming to terms with the Islamic Republic is an essential step in such a process.

On a global level, too, rapprochement with Iran is vital to America's long-term strategic recovery. U.S.-Iranian realignment is necessary to ensure the future adequacy and security of hydrocarbon flows from the Persian Gulf to international energy markets—something that will continue to be a high-order economic and foreign policy interest for the United States, regardless of how far the shale revolution ends up pushing it toward a (strategically artificial)

⁴² This was an important theme in Russian President Vladimir Putin's *New York Times* Op-Ed in September 2013, in which he wrote, "It is alarming that military intervention in internal conflicts in foreign countries has become commonplace for the United States. Is it in America's long-term interest? I doubt it. Millions around the world increasingly see America not as a model of democracy but as relying solely on brute force, cobbling coalitions together under the slogan 'you're either with us or against us.' But force has proved ineffective and pointless. Afghanistan is reeling, and no one can say what will happen after international forces withdraw. Libya is divided into tribes and clans. In Iraq the civil war continues, with dozens killed each day. In the United States, many draw an analogy between Iraq and Syria, and ask why their government would want to repeat recent mistakes." Vladimir Putin, *A Plea for Caution from Russia: What Putin Has to Say to Americans About Syria*, N.Y. TIMES, Sept. 12, 2013, at A31, [.](http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?hp&_r=1&)

standard of “energy independence.”⁴³ Furthermore, there are huge prospective costs that will accrue to America’s interests and strategic standing, globally as well as in the Middle East, from continued U.S. hostility toward Iran.⁴⁴

More than ever before, American interests require rapprochement with the Islamic Republic. Flynt Leverett and I argue that, for its own interests, the United States must therefore take a fundamentally different approach in its Iran policy—an approach captured in the title of our book (*Going to Tehran*) and in its subtitle (*Com[ing] to Terms with the Islamic Republic of Iran*). America needs to come to terms with the Islamic Republic—not as a favor to Iran, but to save its own strategic position and avert the catastrophe of another U.S.-initiated Middle Eastern war, with all that would flow from such a conflict. Coming to terms with the Islamic Republic means accepting it as a legitimate political order representing legitimate national interests—and as a rising regional power unwilling to subordinate its foreign policy to Washington. No American president since the Iranian Revolution—not even Barack Hussein Obama—has been prepared to do this. But it is a key argument in our book that this is not just the only basis on which diplomacy with Iran can succeed—it is the only way for the United States to forestall strategic implosion.⁴⁵

III. THE CHINA MODEL

There is an important precedent in recent American history for this kind of strategically-grounded, genuinely transformational diplomacy. Accepting a rising regional power as a legitimate entity pursuing its interests in a fundamentally rational and defensive way is

⁴³ On this point, see also Leverett & Mann Leverett, *supra* note 5, at 210-11.

⁴⁴ Leverett, *supra* note 10.

⁴⁵ LEVERETT & MANN LEVERETT, *supra* note 8, at 1-11.

how President Richard Nixon and Henry Kissinger enabled the historic opening to China in the early 1970s.⁴⁶

Nixon and Kissinger's achievement was not to "talk" to Beijing; Washington had been doing that for years in ambassadorial-level discussions in Geneva and Warsaw. As Kissinger himself has noted, the United States and the People's Republic held one hundred and thirty-six iterations of these talks, over sixteen years, before the Nixon-Kissinger opening. They were narrow in scope, focused overwhelmingly on grievance, and, as Kissinger describes it, served only to institutionalize stalemate.⁴⁷ Nixon and Kissinger's achievement was not to talk to Beijing. Rather, it was to accept—and to persuade Americans to accept—the People's Republic as, in Nixon's words, "[a nation] pursuing [its] own interests as *it* perceive[s] these interests, just as we follow our own interests as we see them."⁴⁸

Nixon came to office with a deep understanding that the United States needed to realign relations with the People's Republic. For twenty years, from the time of the Chinese Revolution, the United States had worked to isolate and undermine the People's Republic of China. Washington did not just pursue a "regime change" policy toward the People's Republic; it recognized a whole other political structure based on Taiwan as the "real" government of China.⁴⁹ The results of these policies were terrible for the United States and its strategic standing. Trying not to "contain" but to suppress and undermine China ended up undermining the U.S. position in Asia, and got America into the draining quagmire of Vietnam.

⁴⁶ *Id.* at 369-87 (providing a comprehensive discussion that draws lessons from the experience of Sino-American rapprochement for U.S. diplomacy with the Islamic Republic of Iran).

⁴⁷ HENRY KISSINGER, DIPLOMACY 722 (1994); HENRY KISSINGER, ON CHINA 221-24 (2011).

⁴⁸ Richard Nixon, U.S. Foreign Policy for the 1970s: A New Strategy of Peace, First Annual Report to the Congress on United States Foreign Policy for the 1970s 119 (Feb. 18, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2835>.

⁴⁹ For rich and insightful discussion, see especially JAMES PECK, WASHINGTON'S CHINA: THE NATIONAL SECURITY WORLD, THE COLD WAR, AND THE ORIGINS OF GLOBALISM (2006).

In this challenging context, Nixon saw that rapprochement with the People's Republic was a strategic imperative for the United States. Suggestions that Nixon's outreach to Beijing was motivated primarily by an interest in "triangulating" with China against the Soviet Union define his vision—and, ultimately, his achievement—too narrowly.⁵⁰ On a tactical level, extricating America from Vietnam figured far more prominently in Nixon's diplomatic calculations *vis-à-vis* China.⁵¹ On a strategic level, Nixon apprehended that realigning Sino-American relations would, as Kissinger later put it, allow Washington "to regain the diplomatic initiative while the war in Vietnam was still in progress."⁵²

To be sure, realigning relations with the People's Republic meant that the United States would have to give up its failed quest for hegemony in Asia. This quest, though, had already proven grossly counterproductive for American interests, in Asia and globally, while the strategic benefits of an opening to China would, in Nixon's judgment, be enormous. At a time when the People's Republic was a rising regional power, but far removed in many respects from the status of global economic powerhouse it holds today, Nixon understood that, as Kissinger later wrote, "excluding a country of the magnitude of China from America's diplomatic option meant that America was operating internationally with one hand tied behind its back."⁵³ In the end, their initiative to realign relations with China saved America's position in Asia after the tragedy-*cum*-strategic stupidity of Vietnam and restored Washington's global leadership.

Nixon did not just grasp the need for U.S. rapprochement with China; he also recognized that achieving it would require two fundamental changes in Washington's posture toward Beijing. First,

⁵⁰ KISSINGER, ON CHINA, *supra* note 47, at 213-15; HENRY KISSINGER, WHITE HOUSE YEARS 189-90 (1979); MARGARET MACMILLAN, NIXON AND MAO: THE WEEK THAT CHANGED THE WORLD 56-57, 122-23, 162 (2007).

⁵¹ Discussions with Chas Freeman (the veteran U.S. diplomat who worked on China policy intensively during the early years of his career and served as Nixon's interpreter on his historic 1972 trip to Beijing; KISSINGER, DIPLOMACY, *supra* note 47, at 707; KISSINGER, ON CHINA, *supra* note 47, at 214; MACMILLAN, *supra* note 50, at 4-5.

⁵² KISSINGER, DIPLOMACY, *supra* note 47, at 713.

⁵³ *Id.* at 720-21.

he realized that it was incumbent on the United States, as the stronger party with a record of stubborn hostility toward the People's Republic, to demonstrate its *bona fides* proactively to Chinese leaders. So, upon taking office, Nixon directed the CIA to stand down from its longstanding covert operations programs in Tibet and ordered the U.S. Navy's Seventh Fleet to stop what Beijing considered aggressive patrolling in the Taiwan Strait.⁵⁴ Nixon did these things so that the Chinese leadership would know his diplomatic outreach was serious.

Second, Nixon astutely assessed that the incremental, step-by-step diplomacy being intermittently pursued in ambassadorial channels would never achieve a real breakthrough. On the basis of this assessment, he took what Kissinger called the "extraordinary" decision "to put aside all the issues which constituted the existing Sino-American dialogue," (where "each side stressed its grievances,") and to instead concentrate "on the broader issue of China's attitude toward dialogue with the United States."⁵⁵ When Nixon did this, Chinese leaders knew they had a serious partner, prepared to accept the People's Republic, and responded accordingly. Two and a half years later, this approach bore rich fruit with the announcement of the Shanghai Communiqué in February 1972.⁵⁶

⁵⁴ TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA 349-50 (2007); Charles Freeman, *The Process of Rapprochement: Achievements and Problems, in* SINO-AMERICAN NORMALIZATION AND ITS POLICY IMPLICATIONS 3 (Gene T. Hsiao & Michael Witunski, eds. 1983). Additionally, Nixon directed his administration to relax restrictions on travel to and small-scale commercial exchanges with the People's Republic and, when Soviet and Chinese military units clashed along the Sino-Soviet border in 1969, communicated to Moscow that the United States would not quietly acquiesce to a major strategic defeat of the People's Republic. See also U.S. Foreign Policy for the 1970s, *supra* note 48, at 140-42; KISSINGER, DIPLOMACY, *supra* note 47, at 723-24; KISSINGER, ON CHINA, *supra* note 47, at 210-20.

⁵⁵ KISSINGER, DIPLOMACY, *supra* note 47, at 722.

⁵⁶ *Joint Statement Following Discussions with Leaders of the People's Republic of China* (Feb. 27, 1972) IN FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976, Vol. 17, CHINA, 1969-1976, doc. 203, <http://history.state.gov/historicaldocuments/frus1969-76v17/d203>.

IV. GOING TO TEHRAN

Ayatollah Seyed Ali Khamenei and the four Iranian presidents elected over the course of Khamenei's 24-year tenure as the Islamic Republic's Supreme Leader have all said repeatedly that Tehran is open to better relations with America—but only on the basis of mutual respect, equality, and American acceptance of Iran's post-revolutionary political order. These terms are strikingly similar to those that China's communist leaders specified for Sino-American rapprochement. The core argument of *Going to Tehran* is that, today, America must engage Iran on precisely this basis and realign its relations with the Islamic Republic of Iran as thoroughly as Nixon and Kissinger realigned U.S. relations with the People's Republic of China in the early 1970s.⁵⁷

What would it mean, in practical terms, for Washington to accept the Islamic Republic and realign relations with it in this way, particularly with reference to the nuclear issue? On the nuclear issue, it would mean accepting Iran's right to safeguarded enrichment of uranium. Insisting on “zero enrichment”—or even open-ended “suspension—only ensures that negotiations will fail. American recognition of Iran's nuclear rights is a key to diplomatic success. In return for such recognition, the Islamic Republic would ratify and implement the Additional Protocol to the NPT and agree to other more intrusive verification and notification requirements. These steps would give the IAEA as robust a level of access to Iranian nuclear facilities, similar to the access it enjoys to comparable facilities anywhere in the world. Once the terms of the deal were finalized, the United Nations Security Council would lift the multilateral sanctions it has imposed on Iran over its nuclear activities, and Washington would roll back its Iran-related unilateral and secondary sanctions.⁵⁸

Additionally, America and its international partners should lock in a deal on the nuclear issue through expanded nuclear cooperation with the Islamic Republic. Very senior Iranian officials

⁵⁷ For further discussion of Sino-American rapprochement in the 1970s as a model for a comprehensive realignment of U.S.-Iranian relations, see LEVERETT & MANN LEVERETT, *supra* note 8, at 387-92.

⁵⁸ *Id.* at 392.

have said repeatedly, including in conversations with Flynt Leverett and me, that countries concerned about aspects of Iran's nuclear program should send scientists and technicians to work collaboratively on those activities with Iranian counterparts. Tehran has said for years that Iran would be open to associating its nuclear program with multilateral nuclear consortia (including for the production of nuclear fuel) and other joint venture arrangements. The United States and its partners should take up these expressions of openness to international nuclear cooperation.⁵⁹

Accepting Iran's right to enrich is important not only as the key to a diplomatic solution on the nuclear issue. It also implies acknowledgement of the Islamic Republic as a legitimate and enduring political order representing legitimate national interests. Thus, resolving the nuclear issue can and should be used as the basis for a more comprehensive realignment of relations between Washington and Tehran. As part of a broader process of U.S.-Iranian rapprochement, the United States should invite the Islamic Republic into regional negotiations about post-conflict stabilization in Afghanistan and about a prospective political settlement in Syria. America's strategic recovery in the Middle East will necessarily include a reinvention of the "Middle East peace process;" in this vein, Washington should also engage Tehran on the daunting array of issues gathered under the heading "the Arab-Israeli conflict."⁶⁰

Achieving this sort of comprehensive, "Nixon-to-China" rapprochement with the Islamic Republic of Iran is the biggest strategic challenge facing the United States today.

⁵⁹ *Id.* at 392-93.

⁶⁰ For more detailed discussion, see *id.* at 393-95.

Penn State Journal of Law & International Affairs

2013

VOLUME 2 NO. 2

THE COST OF FEAR: AN ANALYSIS OF SEX OFFENDER REGISTRATION, COMMUNITY NOTIFICATION, AND CIVIL COMMITMENT LAWS IN THE UNITED STATES AND THE UNITED KINGDOM

*Kate Hynes**

INTRODUCTION

“Stranger danger” has become a common phrase in the United States and the United Kingdom.¹ The term has been used as an educational tool to protect children from danger, especially from sexually based crimes.² In both countries, highly publicized sex crimes have maintained public focus on the evil nature of sexual

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¹ See National Center for Missing and Exploited Children, http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2034 (last visited Jan. 18, 2012) (United States website providing children and parents with information about the danger posed by strangers); Gloucestershire Constabulary, http://www.gloucestershire.police.uk/kids_aware/3.html (last visited Jan. 18, 2012) (United Kingdom website providing a similar sentiment regarding the dangers that strangers pose to unwitting children).

² See Ernest E. Allen, *Keeping Children Safe: Rhetoric and Reality*, 5 JUV. JUST. J. 1, 16 (1998).

crimes and led to reactionary legislation.³ The two countries have taken different approaches in dealing with the public outcry.

One method of dealing with sex offenders is “keeping a close eye on them.” In the United States, the general public has access to personal information about sex offenders by federal mandate.⁴ Yet, worldwide, the public availability of sex offender information is not a widely accepted premise.⁵ The vast majority of countries that have created sex offender registries do not allow public access to the records.⁶ Like many countries that maintain sex offender registries, the United Kingdom restricts open access to registry information.⁷

A second method of controlling sex offenders is keeping them confined beyond their prison sentence. Civil commitment is the involuntary commitment of a mentally-ill individual for an indefinite period of time.⁸ Both the United States and the United Kingdom practice civil commitment, but only the United States has passed specific civil commitment legislation for sex offenders.⁹

Sex offender laws in the United States are detrimental to both the general public and to the offenders themselves. In contrast, the

³ See Meghann J. Dugan, *Megan’s Law or Sarah’s Law? A Comparative Analysis of Public Notification Statutes in the United States and England*, 23 LOY. L.A. INTL. & COMP. L. REV. 617, 633 (2001) (noting the high profile murder and sexual assault of eight year old Sarah Payne in the United Kingdom); MEGAN NICOLE KANKA FOUNDATION, <http://www.megannicolekankafoundation.org/mission.htm> (last visited Jan. 18, 2012) (describing the rape and murder of seven year old Megan Kanka in New Jersey); Benjamin Radford, *Predator Panic: Reality Check on Sex Offenders*, LIVE SCIENCE (May 16, 2006), <http://www.livescience.com/776-predator-panic-reality-check-sex-offenders.html> (explaining that media focus on inaccurate information regarding sex offenders creates a false perception that sex offenders pose a real and present threat at all times).

⁴ See 42 U.S.C.A. § 16914(West 2006).

⁵ See David Crary, *Human Rights Watch Report Criticizes State, Federal Sex-Offender Laws*, THE ASSOCIATED PRESS (Oct. 12, 2007), <http://www.iht.com/bin/print.php?id=7482413>.

⁶ See *id.*

⁷ See Dugan, *supra* note 3, at 617.

⁸ See BLACK’S LAW DICTIONARY 279 (9th ed. 2009).

⁹ See generally 42 U.S.C.S. § 16911 (LexisNexis 2006); The Mental Health Act, 1893, c. 4, § 63 (U.K.).

United Kingdom's trend toward protecting the rights of sexual offenders in both case law and legislation is a more appropriate and effective way to handle sex offenders. In Part I, this Comment will outline the diverging trends in the right to privacy for sex offenders that has developed in the United Kingdom and the United States.¹⁰ Part II offers evidence to disprove many common misconceptions regarding sex offenders and the economic consequences of these perceptions.¹¹ Parts III and IV discuss sex offender laws in the United States and the United Kingdom and the dramatic impact that public opinion has had on such legislation.¹² In Part V, the comment will explore judicial authority regarding issues of sex offender registration, community notification, and civil commitment.¹³ Finally, Parts VI and VII will analyze the effectiveness of current sex offender laws in both countries and provide recommendations for the future.¹⁴

I. THE RIGHT TO PRIVACY

The United States Constitution does not explicitly reference a right to privacy,¹⁵ but the Supreme Court has recognized privacy as a fundamental right in certain contexts.¹⁶ The Supreme Court has established that the right to privacy is a "penumbra" which is derived from other, more explicit Constitutional protections.¹⁷ Courts have also established that a sex offender's privacy rights remain secondary to maintaining public safety.¹⁸ In the United States, when a right is considered fundamental the government must provide compelling reasons to infringe on the right and must use means that are "narrowly tailored" to achieve its goal.¹⁹ The Supreme Court has

¹⁰ See *infra* Part I.

¹¹ See *infra* Part II.A, B.

¹² See *infra* Part III, IV.

¹³ See *infra* Part V.

¹⁴ See *infra* Part VI, VII.

¹⁵ See generally U.S. CONST.

¹⁶ See Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 605 (2006).

¹⁷ See generally *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

¹⁸ See Kimberly B. Wilkins, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH. L. REV. 1245, 1254-55 (2003).

¹⁹ Goldman, *supra* note 16, at 602.

protected individual decisions in some areas like family life, marriage, and the upbringing of children under the right to privacy.²⁰

Instead of a written Constitution the United Kingdom relies on several governing treaties.²¹ Like the United States, the United Kingdom's privacy rights are not unequivocally articulated in these governing documents. In 1998, the United Kingdom adopted the European Convention on Human Rights [hereinafter "ECHR"] into law through the Human Rights Act of 1998, making it binding law in the United Kingdom.²² Article 8 of the ECHR contains a privacy provision: "Everyone has the right to respect for his private and family life, his home and his correspondence."²³ Paralleling the trends in the United States, Article 8 restricts the right to privacy in the interest of public safety.²⁴

II. SOCIAL AND ECONOMIC IMPLICATIONS OF SEX OFFENDER LEGISLATION

A. Social Implications

The surge of sex offender legislation in the United States and the United Kingdom mirrors the public's fear and opinion toward sex offenders.²⁵ Studies in each country have shown that the general population's perceptions of sex offenders are often skewed.²⁶ The

²⁰ See 16B AM. JUR. 2D *Constitutional Law* § 944 (2004).

²¹ Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition,"* 39 TEX. TECH. L. REV. 261, 271 (2007).

²² See *An Introduction to Child Protection Legislation in the UK*, NSPCC (Oct. 25, 2011), http://www.nspcc.org.uk/inform/research/questions/child_protection_legislation_in_the_uk_wda48946.html (last visited Feb. 2, 2012).

²³ *R and Thompson v. Secretary of State for the Home Department*, [2010] UKSC 17, [2011] 1 A.C. 331, 339 (appeal taken from Eng.).

²⁴ See *id.*

²⁵ See Brittany Enniss, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 699 (2008).

²⁶ See generally Karen Gelb, *Recidivism of Sex Offenders*, SENT'G ADVISORY COMMITTEE (2011), http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/recidivism_of_sex_offenders_research_paper.pdf.

public tends to view strict sex offender laws as necessary to protect the most vulnerable people in the population, children.²⁷ Moreover, individuals tend to see these laws as legitimate, because they perceive sex offenders as having high recidivism rates.²⁸ These perceptions often fall far from reality. Studies have indicated that sex offenders have among the lowest recidivism rates when compared to all criminals.²⁹ Additionally, some of the most dangerous sexual crimes, those involving rape and murder, account for less than three percent of sexual offenses perpetrated in the United States.³⁰

The perception that many sex crimes against children are the result of strangers prowling around playgrounds is also a misconception.³¹ In reality, ninety-three percent of sex offenders who perpetrate crimes against children know their victims.³² Children are much more likely to be abused by someone they know and trust, than from an unknown individual holding out candy from a dark sedan.³³ The perpetuated fear of “stranger danger” might actually be giving parents an unwarranted feeling of safety around the people with whom their children are most familiar.

B. Economic Implications

Penal systems in the United States create large budgetary concerns for both the federal government and the states.³⁴ Experts indicate that prison systems are the second fastest growing

²⁷ See Jill S. Levenson, *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOC. ISSUES AND PUB. POL. 1, 17 (2007).

²⁸ See *id.*

²⁹ See *id.*

³⁰ See Robert E. Freeman-Longo, *Revisiting Megan’s Law and Sex Offender Registration: Prevention or Problem*, AM. PROBATION AND PAROLE ASSOC. (2001), 4 <http://www.appa-net.org/eweb/docs/appa/pubs/RML.pdf>.

³¹ See Levenson, *supra* note 27, at 17.

³² See *id.*

³³ See *id.*

³⁴ See Carrie Johnson, *Budget Crisis Forces a New Approach to Prisons*, NAT’L PUB. RADIO (Feb. 15, 2011), <http://www.npr.org/2011/02/15/133760412/budget-crunch-forces-a-new-approach-to-prisons> (the cost to maintain the prison system in the United States is \$50 billion annually).

expenditure in state budgets.³⁵ Administering additional sex offender programs after the inmate is released from incarceration inevitably adds to the already overinflated penal system budget.³⁶

Large registration systems can be nearly impossible for law enforcement to effectively monitor.³⁷ One police captain in Georgia noted that he needed four police officers working full time just to monitor the sex offender database in one county.³⁸ As the number of sex offenders on a registry increases, it becomes more difficult for both police and civilians to distinguish between dangerous sexual offenders and non-violent offenders.³⁹

Sex offender registration and community notification also has an economic effect on the community where a sex offender resides.⁴⁰ One study showed that home prices deflate by approximately nine percent if a sex offender lives within one tenth of a mile of the property.⁴¹ The perception of safety is a considerable factor for many homebuyers.⁴²

Civil commitment also carries an enormous financial burden. The Washington Institute for Public Policy determined that the cost of operating facilities to hold sex offenders in 2004 was \$224 million

³⁵ See *id.*

³⁶ Maggie Clark, *States Struggle with National Sex Offender Law*, STATELINE (Jan. 5, 2012), <http://www.stateline.org/live/details/story?contentId=622764>.

³⁷ See HUMAN RIGHTS WATCH, *No Easy Answers Sex Offender Laws in the US* (Sept. 12, 2007), <http://www.hrw.org/reports/2007/09/11/no-easy-answers-0>.

³⁸ See Stephanie Chen, *After Prison, Few Places for Sex Offenders to Live*, WALL ST. J. (Feb. 19, 2009), at A16 (explaining that law enforcement are among the most vocal critics of rigid sex offender legislation).

³⁹ See *Sex Laws Unjust and Ineffective*, THE ECONOMIST, Aug. 6, 2009, at 31. (describing an incident of oral sex that caused a sixteen year old girl to become a registered sex offender).

⁴⁰ See Press Release, Longwood University, *Research by Longwood Business Professor Examines Sex Offenders' Effect on Home Sales* (Aug. 06, 2009), http://www.longwood.edu/2010releases_26711.htm.

⁴¹ See *id.*

⁴² See *id.*

annually.⁴³ In New York, the average cost to hold a sex offender in a facility in 2010 was \$175,000.⁴⁴

III. SEX OFFENDER LEGISLATION IN THE UNITED STATES

A. Federal Legislation

In the United States, public fear and outrage have been effective motivators in passing broad legislation regarding sex offenders.⁴⁵ In 1994, Congress passed the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act, which required every state to maintain a sex offender registry.⁴⁶ The Act was named in honor of an eleven-year old boy who was kidnapped near his home by an unidentified male and is still missing today.⁴⁷ The statute provided that sex offenders had to register with the police, but lacked a public notification provision.⁴⁸

In 2006, Congress passed the Adam Walsh Child Protection and Safety Act (“Walsh Act”), which expanded on the prior federal

⁴³ See *Involuntary Commitment of Sex: Violent Predators: Comparing State Laws*, WASH. INST. FOR PUB. POL. (Mar. 2005), <http://www.wsipp.wa.gov/rptfiles/05-03-1101.pdf> (civil commitment of sex offenders differs drastically from jurisdiction to jurisdiction, some states have a very large range of offenders who qualify for commitment).

⁴⁴ See Rosemary Black, *Treatment for a Sexual Predator Costs a Whopping \$175,000 Per Person Per Year in New York: Study*, N.Y. DAILY NEWS, June 22, 2010, <http://www.nydailynews.com/life-style/treatment-sexual-predator-costs-whopping-175-000-person-year-new-york-study-article-1.181482>.

⁴⁵ See *Public Opinion and the Criminal Justice System: Building Support for Sex offender Management Programs*, CENTER FOR SEX OFFENDER MANAGEMENT (2000), <http://heartland.org/policy-documents/public-opinion-and-criminal-justice-system-building-support-sex-offender-management>.

⁴⁶ See 42 U.S.C.A. § 14071 (West 2006).

⁴⁷ See *id.*

⁴⁸ Alisha Powell, *A Systematic Review of Surveys on Public Attitudes Toward Community Notification for Sex Offenders*, University of Alabama (2010) (unpublished M.S. thesis, University of Alabama) (on file with the University of Alabama Library System) (Under the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act a sex offender is anyone who is convicted of a sex crime, but sexual offences are not limited to crimes that involve the act of sex).

sex offender legislation.⁴⁹ The statute's purpose is to "protect the public from sex offenders and offenders against children" by establishing a comprehensive national system for the registration of sex offenders.⁵⁰ Under the Walsh Act, a sex offender is required to provide his/her name, social security number, address, place of employment, and license plate number.⁵¹ The statute indicates that this information, as provided by the offender, will be accessible to the public.⁵²

In addition, the Walsh Act provides guidance to the states on structuring state sex offender legislation.⁵³ The Walsh Act mandates that the Federal Attorney General promulgate guidance and regulations for structuring state-specific sex offender databases.⁵⁴ The Attorney General's guidelines explicitly state that the Walsh Act establishes the minimum applicable standard for sex offender registration.⁵⁵ As a result, states have the authority to create registration requirements that are more comprehensive than the federal legislation.⁵⁶

One example of the direction that the Walsh Act provides to states is the length of time a sex offender will remain on the registry.⁵⁷ The length of the registration requirement is dependent on the classification of the sex offender.⁵⁸ The Walsh Act sets out the maximum registration for Tier I offenders as fifteen years, Tier II offenders as twenty-five years, and Tier III offenders can be required to register for life.⁵⁹ Under the Walsh Act, Tier III offences are those punishable by more than one year in prison and require at least one of the following: a) aggravated sexual abuse or sexual abuse; b)

⁴⁹ See generally 42 U.S.C.A. § 16901 (West 2006).

⁵⁰ *Id.*

⁵¹ See 42 U.S.C.A. § 16914 (West 2006).

⁵² See *id.* § 16918.

⁵³ See *id.* § 16914.

⁵⁴ See *id.* § 16912.

⁵⁵ See The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30212 (May 30, 2007).

⁵⁶ See *id.*

⁵⁷ See 42 U.S.C.A. § 16915 (West 2006).

⁵⁸ See *id.*

⁵⁹ See *id.*

abusive sexual conduct with a minor under the age of thirteen; c) kidnapping of a minor; or d) that the offense be committed after the offender becomes a Tier II offender.⁶⁰

Tier II offenses are also punishable by more than one year in prison and include one of the following: a) sex trafficking; b) coercion and enticement; c) transportation with intent to commit sexual activity; or d) committing an offense after becoming a Tier I offender.⁶¹ Each of the previous offenses must incorporate either sexual activity with a minor, soliciting a minor for prostitution, or the creation or circulation of child pornography.⁶²

Tier I offenses include all sexual offenses not included in Tier II and Tier III, which can include both felonies and misdemeanors.⁶³ The all-encompassing nature of Tier I offenses shows that an extensive number of crimes can land an individual on the sex offender registry.

The overly-broad guidance provided by the Walsh Act has significant consequences.⁶⁴ Many state laws show that a relatively mild offense can cause an individual to become part of the sex offender registry.⁶⁵ To illustrate, thirteen states have incorporated public urination into their list of sexual offenses; and twenty-nine states include consensual sex between teenagers.⁶⁶

B. State Specific Legislation: A Study of Two States

Currently, under the Adam Walsh Act, every state has developed a sex offender registry and community notification scheme.⁶⁷ States have taken different approaches in enacting sex offender legislation and managing sex offenders. The legislation of

⁶⁰ See *id.* § 16911.

⁶¹ See *id.*

⁶² See 42 U.S.C.A. § 16911 (West 2006).

⁶³ See Lori McPherson, *Practitioner's Guide to the Adam Walsh Act*, AM. PROSECUTORS RES. INST., 2007, at 1.

⁶⁴ See HUMAN RIGHTS WATCH, *supra* note 37.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See 42 U.S.C.A. § 16912 (West 2006).

two states, Vermont and Alabama, highlights the enormous amount of discretion provided by the Walsh Act.⁶⁸

Vermont's Community Notification of Sexual Offenders Statute [hereinafter "Vermont Notification Statute"] does not automatically publicize a convicted sex offender's information.⁶⁹ The statute requires sex offenders to provide the information suggested by the federal guidelines in the Walsh Act: name; general physical description; sentence; address; place of employment; nature of the offense; and compliance with treatment recommendations.⁷⁰ Instead of making all sex offender information available to the public, the Vermont Notification Statute permits courts to determine whether an individual is a "sexually violent predator."⁷¹ If the court determines a sex offender to be a sexually violent predator by clear and convincing evidence, the offender will be placed on the sex offender registry for life and be subject to community notification.⁷² An individual who is adjudged not to be a sexually violent predator will not be subject to community notification.⁷³

Alabama's sex offender legislation has taken a different path. In 2011, the Alabama House of Representatives unanimously voted to make the State's sex offender laws stricter through the Alabama Sex Offender Registration and Community Notification Act [hereinafter "Alabama Sex Offender Act"].⁷⁴ The statute requires all offenders who have been convicted of a sex offense to join the registry and be subject to public notification of their status.⁷⁵ Unlike Vermont's law, Alabama's statute does not distinguish between levels of crimes for purposes of public notification.⁷⁶ The statute's definition of a sexual offense broadly encompasses many crimes,

⁶⁸ See generally Vt. Stat. Ann. tit. 13, § 5402 (2009); AL ST § 15-20A-3.

⁶⁹ See Vt. Stat. Ann. tit. 13, § 5405 (2009).

⁷⁰ See *id.* § 5411.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *House Passes Stronger Sex Offender Bill*, ASSOCIATED PRESS, May 25, 2011, at A12.

⁷⁵ See AL ST § 15-20A-3.

⁷⁶ See *id.* § 15-20A-5.

ranging from very serious crimes like sexual torture to comparatively minor crimes like indecent exposure.⁷⁷

The Alabama Sex Offender Act further imposes substantial burdens on registered sex offenders for the duration of the registration.⁷⁸ For example, sex offenders are required to verify their registration in person every three months.⁷⁹ This obligation will be enforced indefinitely in cases where the particular sex offense requires lifetime registration.⁸⁰ Homeless sex offenders bear the even greater burden of being required to report in person to local law enforcement every seven days to verify their registration.⁸¹ If an individual does not comply with the verification procedures, he or she may be subject to felony charges.⁸²

One of the most striking aspects of the Alabama Sex Offender Act is the electronic monitoring system.⁸³ The statute compels individuals who were either guilty of a Class A felony or deemed to be a sexually violent predator to comply with electronic monitoring procedures for at least ten years.⁸⁴ The monitoring system produces reports, upon request, of a particular sex offender, to determine if he or she was near a crime scene, left an identified area, or violated curfew requirements.⁸⁵

C. The Diverging State Trends under the Walsh Act

The significant contrast in legislation promulgated in Alabama and Vermont shows the immense discretion provided to states by the Walsh Act.⁸⁶ Furthermore, the approaches illustrate two major issues that sex offender legislation addresses: public safety and the human rights of sex offenders. Ideally, such legislation will

⁷⁷ *See id.*

⁷⁸ *See id.* § 15-20A-10.

⁷⁹ *See id.*

⁸⁰ *See* AL ST § 15-20A-10.

⁸¹ *See id.* § 15-20A-12.

⁸² *See id.*

⁸³ *See id.* § 15-20A-20.

⁸⁴ *See id.*

⁸⁵ *See* AL ST § 15-20A-20.

⁸⁶ *See* 42 U.S.C.A. § 16914(West 2006).

balance both issues without allowing fear to tip the scales against preserving sex offender rights.

One positive aspect of the Vermont Notification Statute is that it considers public safety while also acknowledging the rights of convicted sex offenders.⁸⁷ An official within the Vermont Department of Justice explained that reducing the number of sex offenders subject to community notification serves two purposes.⁸⁸ First, it aids the community in recognizing the offenders that pose a significant threat; and second, it helps sex offenders reintegrate into society.⁸⁹

The first purpose indicated by the Vermont Department of Justice addresses the safety concerns that have been a driving force in the creation of sex offender registration laws throughout the United States. An individual's ability to determine the potential danger posed by an offender can be reduced when a registry has a mixture of violent offenders and non-violent offenders. Vermont's legislation assists with this concern by providing public access to the offenders who potentially pose the largest threat to society.

The second purpose, reintegration, is focused on the rights of sex offenders rather than public safety. Vermont's legislation aids reintegration into the community because it allows sex offenders, who have committed a non-violent offense, to remain anonymous. This anonymity arguably does not have a detrimental effect on public safety because the police still have access to all sex offender information.⁹⁰

In contrast, the Alabama Sex Offender Act infringes significantly on the lives of sex offenders living in the state,⁹¹ and thereby demonstrates the problem with the massive amount of discretionary power provided by the Walsh Act.⁹² The Walsh Act lacks provisions regarding reporting requirements and electronic

⁸⁷ See generally Vt. Stat. Ann. tit. 13 (2009).

⁸⁸ See HUMAN RIGHTS WATCH, *supra* note 37.

⁸⁹ See *id.*

⁹⁰ See Vt. Stat. Ann. tit. 13, § 5411 (2009).

⁹¹ See generally AL ST § 15-20A-3.

⁹² See generally 42 U.S.C.A. § 16901 (West 2006).

monitoring.⁹³ The Alabama Sex Offender Act states that the purpose of the legislation is public safety, but it fails to provide evidence to show that electronic monitoring or rigid reporting requirements aid the goal of public safety.⁹⁴ As a result, the State's ability to implement strict reporting requirements and monitor a private citizen's movements at all times is a strong curtailment of sex offender's privacy without proper justification.

D. The Effectiveness of Current Sex Offender Laws

1. *The Effectiveness of Notification Laws*

Several studies have been conducted on the effectiveness of registration and community notification laws. One study examined the effect of notification laws on deterrence by examining data from fifteen states over a period of ten years.⁹⁵ The study concluded that an average-sized sex offender registry reduces crime by thirteen percent, with the reduction in crime increasing with the size of the registry.⁹⁶ A second study found that public notification laws increase recidivism rates of offenders.⁹⁷ The study hypothesized that once sex-offender information becomes public the psychological, social, and financial costs of the information make a crime-free lifestyle less desirable for the offender.⁹⁸

A comprehensive analysis of sex offenders in New Jersey determined that the state's largest decline in sexual offenses occurred before the passage of registration and notification laws.⁹⁹ Further, the

⁹³ See generally *id.*

⁹⁴ See generally AL ST § 15-20A-2 (2006).

⁹⁵ See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 1 J.L. ECON 54, 15 (2008).

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See Kristen Zgoba & Karen Bachar, *Sex Offender Registration and Notification: Limited Effects in New Jersey*, NAT'L INST. JUST. (2009), <https://www.ncjrs.gov/pdffiles1/nij/225402.pdf>.

study concluded that notification laws had no effect in reducing the number of sexual offenses or the number of victims.¹⁰⁰

2. *The Effectiveness of Civil Commitment*

Currently, there have been no studies conducted to determine the effectiveness of civil commitment in reducing recidivism.¹⁰¹ One state attempted to reduce the number of offenders held in civil commitment facilities by relaxing the standards for discharge.¹⁰² None of the offenders released committed a new sexual offense.¹⁰³ Yet, subsequent media scrutiny caused the legislature to backtrack by strengthening its release standards once again.¹⁰⁴

IV. UNITED KINGDOM SEX OFFENDER LEGISLATION

The United Kingdom first adopted sex offender registration with the Sex Offender Act of 1997 (“1997 Act”).¹⁰⁵ Although the 1997 Act requires sex offenders to provide certain information upon release, it does not require as much information as the United States’ legislation.¹⁰⁶ Additionally, the 1997 Act does not allow public access to sex offender data.¹⁰⁷ In fact, European courts have consistently held that sex offender registration data is not to be made public domain.¹⁰⁸ The Sexual Offences Act of 2003 replaced the 1997 Act, with more definitive language.¹⁰⁹

¹⁰⁰ See *id.*

¹⁰¹ See Hollida Wakefield, *The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?*, 1 J. OF SEXUAL OFFENDER CIV. COMMITMENT: SCI. AND THE L. 141, 147 (2006).

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See Sex Offences Act, 1997, c. 51 (U.K.); Sexual Offences Act, 2003, c. 42 (U.K.) (the United Kingdom adopted the Sexual Offences Act of 2003 which replaced the Sex Offender Act of 1997 without significantly altering the sex offender registration requirements from the original act).

¹⁰⁶ See *id.*

¹⁰⁷ See Dugan, *supra* note 3, at 631.

¹⁰⁸ See *id.*

¹⁰⁹ See Sexual Offences Act, 2003, c. 42 (U.K.).

Similar to the United States, a highly publicized crime involving a child created political pressure in the United Kingdom to ensure public safety.¹¹⁰ However, the United Kingdom refused to create a system of absolute public notification as the United States implemented.¹¹¹ Rather, in 2000, the United Kingdom added the Child Sex Offender Disclosure Scheme (“Sarah’s Law”), which allowed victims and their families to be informed about specific perpetrators.¹¹² The newest version of Sarah’s Law, adopted in 2009, is even more permissive, allowing parents to request the sex offender status of an individual who has regular, unsupervised contact with their children.¹¹³ The provision applies only if the sex offender was incarcerated in excess of one year.¹¹⁴

Even though Sarah’s Law does not allow the general public to access sex offender information, there is an obvious potential for an individual’s sex offender status to spread throughout a community.¹¹⁵ The new law also has the attendant risk of causing sex offenders to resist compliance with registration requirements.¹¹⁶ The widespread dissemination of sex offender information is supported by the large number of people requesting sex offender records. Statistics

¹¹⁰ See *id.* at 617.

¹¹¹ See Autumn Long, *Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms*, 18 TRANSNAT’L. L. & CONTEMP. PROBS. 145, 159 (2009).

¹¹² See *id.*

¹¹³ See Press Release, Home Office, National Rollout of Scheme to Protect Children (Aug. 6, 2010), <http://www.homeoffice.gov.uk/media-centre/press-releases/national-rollout-scheme-protect> (official government statement explaining that Sarah’s Law will help protect children from sexual offences by allowing parents to access the information about potentially dangerous individuals).

¹¹⁴ See Long, *supra* note 111, at 159.

¹¹⁵ See Stephen Wright, *Sarah’s Law to go Nationwide: Finally, Parents Win Access to Police Intelligence on ‘Suspects’ in Contact with their Children*, DAILY MAIL (Jan. 25, 2010), <http://www.dailymail.co.uk/news/article-1245680/Sarabs-Law-allowing-parents-carry-sex-offender-checks-rolled-out.html>.

¹¹⁶ See Daniel Chadwick, *Sarah’s Law*, INSIDE TIME (May 2007), <http://www.insidetime.org/articleview.asp?a=24>.

regarding a pilot version of Sarah's Law indicated that one in fifteen people requested information about potential sex offenders.¹¹⁷

Restrictions on public notification in the United Kingdom may be further eroded with the government's proposal of Clare's Law.¹¹⁸ This new law would provide a mechanism for individuals to inquire about an intimate partner's history of domestic violence.¹¹⁹ Currently, it is unclear whether the government plans to model the law after Sarah's Law.¹²⁰

A. The Proper Balance between Sex Offender Rights and Public Safety

The United Kingdom's method of sex offender registration and community notification is a more reasonable approach. Like the United States, the United Kingdom's legislature had to deal with the public fear emanating from a high profile crime.¹²¹ Rather than succumbing to public sentiment, the adoption of the 1997 Act demonstrated dedication to protecting the public while still maintaining the privacy of sex offenders. The legislation remains focused on public safety because sex offender records are provided to the police. Sex offender information should lie solely in the hands of police for two reasons. First, when citizens are given access to public information there is always the possibility of vigilantism. Second, the responsibility of monitoring dangerous situations should be left to officials who are trained to deal with offenders rather than defenseless citizens.

¹¹⁷ See Mark Hughes, *Sarah's Law to be Rolled Out Nationally*, THE INDEPENDENT, Mar. 3, 2010, at 16 (the pilot program of Sarah's law was originally initiated in four cities).

¹¹⁸ See Press Release, HOME OFFICE, Consultation of 'Clare's Law' Launched (Oct. 25, 2011), available at <https://www.gov.uk/government/news/consultation-on-clares-law-launched>.

¹¹⁹ See *id.*

¹²⁰ See Lucy Reed, *Why Clare's Law Won't Prevent Domestic Violence*, THE GUARDIAN (Jul. 22, 2011), <http://www.guardian.co.uk/society/2011/jul/22/why-clares-law-wont-prevent-domestic-violence>.

¹²¹ See *supra* note 3, at 617.

Unfortunately, the United Kingdom appears to be veering away from its original stance. The adoption of Sarah's Law and the proposal of Clare's Law are a disturbing trend in the United Kingdom. Both laws indicate an erosion of the original privacy protections afforded to sex offenders. If the trend continues, the United Kingdom's system may start to look more like the United States' model.

V. CASE LAW DEVELOPMENT

A. Sex Offender Registration and Disclosure

1. *United Kingdom*

In 2010, the Supreme Court of the United Kingdom laid down a significant decision regarding the rights of sex offenders. The court decided *R v. Secretary of State for the Home Department* based on Article 8 of the ECHR.¹²² In the case, two sex offenders, who were subject to lifetime registration requirements, appealed to the Supreme Court arguing that the Sexual Offences Act of 2003 violated their right to privacy under Article 8 of the ECHR. They argued that the violation occurred because there was no mechanism within the statute for the courts to review lifetime registration on a case-by-case basis.¹²³

The Court reasoned that the government's goal was unmistakably legitimate and that deterrence of sexually related crimes was of "great social value."¹²⁴ However, the court focused the discussion on the proportionality of subjecting individuals to notification requirements for life without the ability to obtain judicial review.¹²⁵ The court, using a balancing analysis, decided in favor of protecting the victims due to the serious impact of sexual offenses;

¹²² See *R and Thompson v. Secretary of State for the Home Department*, [2010] UKSC 17, [2011] 1 A.C. 331 (appeal taken from Eng.).

¹²³ See *id.* at 339.

¹²⁴ See *id.* at 342.

¹²⁵ See *id.*

yet, the Court also acknowledged that the scheme must not effect additional punishment on the offender.¹²⁶

Even though the protection of victims was its primary concern, the Court still reasoned that lifetime registration requirements for sex offenders, without the ability to appeal, interfered with privacy rights pursuant to ECHR Article 8.¹²⁷ The registration requirements alone were acceptable to the court because the interference was directed at the “prevention of crime and the protection of rights and freedoms of others.”¹²⁸ The court found that the problem was the deprivation of judicial review when an offender was subject to lifetime registration.¹²⁹ The court found an interference with privacy rights because the registration information had the potential to reach third parties.¹³⁰ The court determined that the risk associated with the likely dissemination of sex offender information gave offenders subject to registration a substantial interest in petitioning removal from the list.¹³¹

The decision in *R v. Secretary of State for the Home Department* was controversial in the United Kingdom, and many powerful figures in the government disagreed with the ruling. The Prime Minister expressed his disgust, remarking that the decision “seems to fly completely in the face of common sense.”¹³² Home Secretary, Theresa May, publicly announced that the Government would make “minimal changes” and that the standards for obtaining an appeal would be set as “high as possible.”¹³³ The strong government reaction

¹²⁶ See *id.*

¹²⁷ See *R and Thompson v. Secretary of State for the Home Department*, [2010] UKSC 17, [2011] 1 A.C. 331 (appeal taken from Eng.).

¹²⁸ *Id.* at 348.

¹²⁹ See *id.* at 353.

¹³⁰ See *id.* at 348-49.

¹³¹ See *id.*

¹³² See generally Sophie Lockley, *The Supervision of Sex Offenders in the Community – At What Cost?*, INTERNET J. OF CRIMINOLOGY, http://www.internetjournalofcriminology.com/Lockley_The_Supervision_of_Sex_Offenders_in_the_Community_IJC_Aug_2011.pdf.

¹³³ See *Sex Offender Registration Appeals to Go Ahead*, BRITISH BROADCASTING COMPANY (Feb 16, 2011), <http://www.bbc.co.uk/news/uk-12476979> (the United Kingdom’s sex offender register is not a centrally held

demonstrates that the tension between fear of sexual predators and the civil rights of sex offenders is not a phenomenon unique to the United States.

In the same year, a United Kingdom Court of Appeals considered the disclosure of sex offender information under Article 8 of the ECHR in *H and L v. A City Council*.¹³⁴ In that case, a man was convicted of indecent assault of a seven year old boy while he had a pending trial for a similar offense.¹³⁵ A local authority determined that his conviction and pending trial would be communicated to several organizations with which he had contact, that the public university would discontinue employing his company, and that he would be asked to leave several community committees of which he was a part.¹³⁶ The court reasoned that the need for disclosure must be determined on a case-by-case basis.¹³⁷ In this instance, a blanket disclosure to several organizations violated the sex offender's Article 8 privacy rights.¹³⁸

2. *The United Kingdom's Balanced Approach*

The two decisions discussed above are an important step in sex offenders' rights. The cases demonstrate the Court's view that protecting sex offenders' rights does not necessarily diminish community safety. The decision in *R v. Secretary of State for the Home Department* does not reduce safety within the community because it does not encourage the automatic removal of sex offenders from the registry.¹³⁹ Rather, the decision simply finds that sex offenders must be able to present the reasons why they believe that they are no longer a danger to the community.¹⁴⁰ Courts are charged with trust and discretion to make decisions on very important issues in many

database of sex offender information, but rather a notification system used to update the police).

¹³⁴ *H and L v A City Council*, [2011] EWCA (Civ) 403, (Eng.)

¹³⁵ *See id.* at 4.

¹³⁶ *See id.* at 7.

¹³⁷ *See id.* at 67.

¹³⁸ *See id.* at 29.

¹³⁹ *See R and Thompson v. Secretary of State for the Home Department*, [2010] UKSC 17, [2011] 1 A.C. 331, 348-49 (appeal taken from Eng.).

¹⁴⁰ *Id.* at 342.

other areas of law. There should be the same level of confidence in the court to make determinations regarding a sex offender's registration status.

H and L v. A City Council follows a similar trend, properly giving courts discretionary power to determine the rights of sex offenders on a case-by-case basis.¹⁴¹

Regrettably, the United Kingdom's legislature appears to be moving in the opposite direction, based on its passing and proposing legislation that allows for more community access to sex offender information.¹⁴² The split between the courts and the legislature can likely be explained by the fact that legislative officials are elected into office. A legislative action will often be significantly influenced by public fears and desires. If public perceptions regarding sex offenders remain the same, it is very unlikely that the legislature would adopt a law protecting the privacy rights of sex offenders. The result of this public influence is that the burden of protecting the privacy rights of unpopular groups, like sex offenders, will frequently fall to the courts.

3. *United States*

The Supreme Court of the United States has affirmed the constitutionality of sex offender registration and community notification.¹⁴³ In *Connecticut Department of Public Safety v. Doe*, Connecticut's public disclosure of the state's sex offender registry was challenged on procedural due process grounds.¹⁴⁴ Connecticut state law made a sex offender's name, address, photograph, and description of the sexual offence available to the public.¹⁴⁵ Respondent argued that his Fourteenth Amendment rights were violated because he was not provided a hearing to determine his

¹⁴¹ See *H and L v. A City Council*, [2011] EWCA (Civ) 403, 67 (Eng.).

¹⁴² See Press Release, Home Office, National Rollout of Scheme to Protect Children (Aug 6, 2010), available at <http://www.homeoffice.gov.uk/media-centre/press-releases/national-rollout-scheme-protect>.

¹⁴³ See generally *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

¹⁴⁴ See *id.* at 4.

¹⁴⁵ See *id.*

current level of dangerousness.¹⁴⁶ Respondent claimed that the liberty interest implicated by the Fourteenth Amendment was his “reputation” and his “status under state law.”¹⁴⁷

The Supreme Court determined that respondent’s claim was meritless because the statutory scheme did not require a showing that the offender was currently dangerous.¹⁴⁸ In essence, respondent had no claim under the Fourteenth Amendment because the statute did not provide for a hearing as required process.¹⁴⁹ The law only required a conviction for an offender to be placed on the public registry.¹⁵⁰ As a result, the court determined that the claim was not relevant to the statutory scheme.¹⁵¹

4. *Privacy Concerns Under the Walsh Act*

Importantly, the court noted that it decided *Connecticut Department of Safety* on procedural due process grounds, and explicitly stated that it held no opinion on whether the state law violated substantive due process rights.¹⁵² Accordingly, the decision left room for further substantive law challenges to be brought before the court. At the time of this publication, no further due process challenges on the Walsh Act’s community notification scheme have been granted certiorari before the Supreme Court.¹⁵³ However, the successful privacy challenge against the disclosure of sex offender information in the United Kingdom shows that there is a strong argument to be made that public notification laws are a violation of privacy rights.¹⁵⁴

The United States has not extended a fundamental right of privacy to sex offenders. However, there is a possibility that the

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* at 5-6.

¹⁴⁸ *See* Connecticut Dept. of Pub. Safety v. Doe, 538 U.S. 1, 8 (2003).

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 7.

¹⁵¹ *See id.* at 8.

¹⁵² *See id.* at 7-8.

¹⁵³ *See generally* Smith v. Doe, 538 U.S. 84, 89-118 (2003) (confirming the constitutionality of community notification laws under the Walsh Act based on an Ex Post Facto challenge).

¹⁵⁴ *See* H and L v. A City Council, [2011] EWCA (Civ) 403, 67 (Eng.).

Supreme Court will consider privacy rights if a substantive claim regarding sex offender registration and community notification is brought before the Court. If the Court determines that sex offenders have a fundamental right to privacy, the government cannot infringe on the privacy right without a substantial interest which is narrowly tailored to meet the goal provided.¹⁵⁵ There is little doubt that community safety is a substantial government interest. In the case of a substantive due process claim, the question before the court will likely be whether registration and community notification are sufficiently tailored to meet the goal of public safety. In such a case, the burden will be on the government to show that community notification actually aids in the goal of keeping the public safe.

B. Civil Commitment

Civil Commitment of sexual offenders is the involuntary commitment of offenders beyond their prison sentence based on the concern that they are likely to reoffend.¹⁵⁶ The proceeding is considered civil, so it lacks many of the constitutional protections provided during criminal proceedings.¹⁵⁷ Generally, civil commitment actions will not provide protections such as the right to remain silent, jury trials, procedural rights, the guarantee of a speedy process, and bail.¹⁵⁸ The Supreme Court of the United States has considered the constitutionality of statutes allowing for the civil commitment of sex offenders in two cases.¹⁵⁹

The Supreme Court first considered sex offender civil commitment in *Kansas v. Hendricks*, which involved a defendant who was convicted for taking indecent liberties with two thirteen-year-old

¹⁵⁵ See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (established the fundamental right to privacy under the United States Constitution by invalidating a statute that banned contraceptive distribution to married couples).

¹⁵⁶ See BLACK'S LAW DICTIONARY 279 (9th ed. 2009).

¹⁵⁷ See Eric S. Janus & Brad Bolin, *An End-Game for Sexually Violent Predator Laws: As-Applied Invalidity*, 6 OHIO ST. J. CRIM. L. 25, 27 (2008).

¹⁵⁸ See Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 979 (2011).

¹⁵⁹ See generally *U.S. v. Comstock*, 130 S. Ct. 1949 (2010); see also *Kansas v. Hendricks*, 521 U.S. 346 (1997).

boys.¹⁶⁰ After the defendant's conviction, Kansas enacted the Sexually Violent Predator Act, creating procedures to civilly commit an individual beyond his or her prison sentence if the individual was deemed likely to commit "predatory acts of sexual violence."¹⁶¹ Shortly before the defendant's release he was civilly committed pursuant to the Sexually Violent Predator's Act.¹⁶² The defendant appealed his civil commitment claiming a violation of due process.¹⁶³

The Supreme Court held that the civil commitment statute did not violate substantive due process. The decision noted an important restriction on a citizen's right to liberty: "although freedom from physical restraint has always been at the core of the liberty protected by Due Process Clause from arbitrary governmental action, that liberty interest is not absolute."¹⁶⁴ The Court reasoned that involuntary civil commitment does not violate substantive due process if the commitment follows "proper procedures" and "evidentiary standards."¹⁶⁵ The Kansas statute required a previous conviction, finding of "future dangerousness", and a "mental abnormality" or "personality disorder" that made a person unable to control the unwanted behavior.¹⁶⁶ Because the statute limited civil confinement to a sufficiently narrow class of people, only those who were unable to control their dangerous behavior, the Court ruled that the statute did not infringe on constitutionally protected liberties.¹⁶⁷

The Court also examined the significant procedural safeguards found in the Kansas statute.¹⁶⁸ The procedures included: (1) notification to the prosecutor that a person might have met the statutory requirements sixty days before the inmate's release; (2) forty-five days for the prosecutor to decide whether to file a petition; (3) a determination by a court that probable cause existed to support that a person was a "sexually violent predator;" (4) professional

¹⁶⁰ See *Hendricks*, 521 U.S. at 353.

¹⁶¹ *Id.* at 350.

¹⁶² See *id.* at 355-56.

¹⁶³ See *id.* at 353.

¹⁶⁴ See *id.* at 356.

¹⁶⁵ See *Hendricks*, 521 U.S. at 357.

¹⁶⁶ See *id.* at 358.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 352-56.

evaluation; and (5) a trial to determine whether the individual was, beyond a reasonable doubt, a “sexually violent predator,” with the state carrying the burden of proof.¹⁶⁹

Federal civil commitment for sex offenders is addressed in the Walsh Act.¹⁷⁰ Under the Act, the Attorney General, or an individual authorized by the Attorney General, has the ability to identify an individual as a “sexually dangerous person.”¹⁷¹ Upon this classification, the clerk in the jurisdiction where the individual is confined will receive a certificate and the court will order a hearing to determine if an individual is sexually dangerous.¹⁷² The court then has the discretion to hold an individual in civil commitment, beyond his prison term, if the individual: 1) has “engaged or attempted to engage in sexually violent conduct or child molestation”; 2) “suffers from a serious mental illness, abnormality or disorder”; and 3) “as a result of that mental illness, abnormality, or disorder is sexually dangerous to others.”¹⁷³ The evidentiary standard to civilly commit an individual under the Walsh Act is proof by clear and convincing evidence.¹⁷⁴

In 2010, the Supreme Court considered the constitutionality of a federal civil commitment statute in *United States v. Comstock*.¹⁷⁵ The issue before the Court was whether the Walsh Act was an unconstitutional expansion of congressional powers under Article I.¹⁷⁶ The Court held that civil commitment section of the Walsh Act was constitutional under the Necessary and Proper Clause, Art. I, § 8, cl. 18.¹⁷⁷ The Necessary and Proper Clause permits Congress to “enact laws governing prisons and prisoners” as long as Congress is acting within their enumerated powers.¹⁷⁸ As a result of the Court’s

¹⁶⁹ *Id.* at 353-54.

¹⁷⁰ *See Generally* 42 U.S.C.S. § 16911 (West 2006).

¹⁷¹ *See* 18 U.S.C.A. § 4248 (West 2006).

¹⁷² *Id.*

¹⁷³ *See id.* § 4248.

¹⁷⁴ *See id.*

¹⁷⁵ *See* *U.S. v. Comstock*, 130 S. Ct. 1954.

¹⁷⁶ *See id.* at 1955.

¹⁷⁷ *See id.* at 1970.

¹⁷⁸ U.S. CONST. art. I, § 8, cl. 18.

focus on the broad scope of federal power, *Comstock* is often cited for issues of federalism rather than civil rights issues of sex offenders.¹⁷⁹

Unlike the Court in *Hendricks*, the *Comstock* Court did not consider the procedural due process claim.¹⁸⁰ Consequently, the *Comstock* Court did not spend very much time comparing the federal statute with the state statute found in *Hendricks*. From a procedural standpoint, civil commitment under the Walsh Act is distinguishable from the state statute in *Hendricks*. Under the federal statute, the Attorney General's certification that an individual is sexually dangerous is sufficient to begin commitment proceedings, rather than the factors provided under the statute in *Hendricks*.¹⁸¹ Further, the burden of proof in the statute in *Hendricks* was beyond a reasonable doubt, while the burden of proof in the Walsh Act was the clear and convincing evidence standard.¹⁸²

1. *Do Sexually Violent Predators Need Procedural Protections?*

The relatively lengthy evidentiary and procedural standards set forth by the statute in *Hendricks* show an attempt by the state legislature to avoid arbitrary decision-making. Because civil commitment can be an indefinite restriction of physical freedom, procedural safeguards are vastly important to ensure that the decision to incapacitate an individual is necessary. In contrast, the lack of certain protections under the Walsh Act should be cause for alarm. The "clear and convincing evidence" standard is a lower burden of proof than the "beyond a reasonable doubt" standard used in criminal prosecutions.¹⁸³ This lower standard is troubling because the statute allows individuals to be detained in civil commitment indefinitely.¹⁸⁴

¹⁷⁹ See Jeffrey Toobin, *Without a Paddle; Can Stephen Breyer Save the Obama Agenda in the Supreme Court?*, NEW YORKER, Sept. 27, 2010, at 34, 40.

¹⁸⁰ See generally *U.S. v. Comstock*, 130 S. Ct. 130 S. Ct. 1949 (2010).

¹⁸¹ See 18 U.S.C. § 4248 (2006).

¹⁸² See *Kansas v. Hendricks*, 521 U.S. at 353-54; 18 U.S.C.A. § 4248(d) (West 2006).

¹⁸³ See 18 U.S.C.A. § 4248 (West 2006).

¹⁸⁴ See *id.*

The Walsh Act does provide a mechanism for review, which includes both continuing psychiatric care and judicial review every six months.¹⁸⁵ The availability of review may provide a false sense of security for individuals detained in civil commitment.¹⁸⁶ Studies have shown that offenders who enter civil commitment generally will never be released.¹⁸⁷

2. *The United Kingdom and Civil Commitment*

The United Kingdom's Sexual Offenses Act does not contain a section permitting the civil commitment of sex offenders.¹⁸⁸ However, the United Kingdom does have a general process for detaining certain individuals.¹⁸⁹ The Mental Health Act of 1983 ("The Mental Health Act") was enacted "with respect to the reception, care, and treatment of mentally disordered patients, the management of their property, and other related matters."¹⁹⁰ Section 63 of the Act allows for the compulsory treatment of a patient suffering from a mental disorder.¹⁹¹ There is no specific provision for the compulsory treatment of mentally ill inmates or sexually violent predators.¹⁹² The act applies to patients generally, rather than targeting a specific group of potentially dangerous individuals.¹⁹³

3. *Reconsidering Procedural Safeguards for Civil Commitment*

Civil commitment can, in some ways, be more restrictive than incarceration because of the possibility of an indefinite term.¹⁹⁴ The United Kingdom's lack of a civil commitment provision in its sex offender legislation shows that the practice specifically aimed at

¹⁸⁵ See *United States v. Comstock*, 130 S. Ct. at 1955.

¹⁸⁶ See 18 U.S.C. § 4247 (2006).

¹⁸⁷ See generally Wakefield, *supra* note 101 (describing the government's doctrinal shift from punishing crimes that have already been committed to categorizing individuals who pose a potential threat of committing future crimes).

¹⁸⁸ See Sexual Offenses Act, 2003, c. 42 (U.K.).

¹⁸⁹ See The Mental Health Act, 1983, c. 4, § 63 (U.K.).

¹⁹⁰ *Id.* c. 1, § 1.

¹⁹¹ See *id.* c. 4, § 63.

¹⁹² See generally The Mental Health Act, 1983 (U.K.).

¹⁹³ *Id.*

¹⁹⁴ See Wakefield, *supra* note 101, at 146.

sexual offenders may not be a necessity.¹⁹⁵ If the United States continues with the practice of civil commitment of a sex offender, strong procedural safeguards must be in place. One potential model is the criminal trial. A civil commitment proceeding modeled after a criminal trial would use the “beyond a reasonable double standard.”

4. *Studies Support Reform*

The studies performed in the United States confirm that the United Kingdom has taken a superior approach in creating sex offender laws.¹⁹⁶ Community notification laws have the opposite effect of their intended result, while registration laws only become problematic when the registry grows to be too large to manage. The detrimental effect of notification laws makes sense because ordinary citizens have no way of using the knowledge other than ostracizing the offender. The negative results stemming from community notification indicate that the goal of public safety is not served by these laws.

The lack of any significant research on the civil commitment of sex offenders is problematic. The process denies an individual the ability to freely live his life after he has finished paying his debt to society. In order for such a pervasive restriction on freedom to be worthwhile, there must be significant benefits. Without proper research there is no way to determine whether the indefinite commitment of certain sex offenders is benefiting the public in any real way.

VI. UNCONVENTIONAL APPROACHES

Several unconventional sex offender programs have been established in some states and the United Kingdom. One such alternative program is Circles of Support and Accountability

¹⁹⁵ See Sexual Offenses Act, 2003, c. 42 (U.K.).

¹⁹⁶ See Zgoba & Bachar, *supra* note 99; see also Prescott & Rockoof, *supra* note 95.

(“COSA”).¹⁹⁷ COSA involves a group of volunteers who form a “circle” around an offender, who is known as the “core member.” The “circle” essentially provides consistent support for the sex offender’s reintegration into the community.¹⁹⁸ The group serves dual functions: 1) providing a “supportive social network” to the core member; and 2) requiring that the offender take accountability for his future risk to society.¹⁹⁹

In the United States, several states have implemented a program known as Special Sex Offender Sentencing Alternative (“SSOSA”).²⁰⁰ SSOSA is offered to certain offenders in lieu of a lengthy jail sentence.²⁰¹ Generally, a SSOSA will require a shorter jail sentence followed by treatment and supervision.²⁰² After analyzing five years of data, the Washington Institute for Public Policy found that the recidivism rates for sex offenders granted SSOSA were lower than offenders not granted SSOSA.²⁰³

VII. CONCLUSION AND RECOMMENDATIONS

Public fear and outrage have caused both the United States and the United Kingdom to take action to control the perceived danger presented by sex offenders.²⁰⁴ The United Kingdom’s legislation has attempted to balance both the interests of sex

¹⁹⁷ See *Circles of Support and Accountability*, FRESNO PACIFIC UNIVERSITY, <http://peace.fresno.edu/cosa/> (last visited Jan. 18, 2011); see also CIRCLES UK, <http://www.circles-uk.org.uk/> (last visited Jan. 18, 2011).

¹⁹⁸ See *Circles of Support and Accountability*, FRESNO PACIFIC UNIVERSITY, <http://peace.fresno.edu/cosa/> (last visited Jan. 18, 2011); see also CIRCLES UK, <http://www.circles-uk.org.uk/> (last visited Jan. 18, 2011).

¹⁹⁹ See CIRCLES UK, <http://www.circles-uk.org.uk/> (last visited Jan. 18, 2011)(explaining that COSA is a community based approach to solving the problem of sex offender recidivism where the community acts as a unit to aid the offender).

²⁰⁰ See Wash. Inst. for Pub. Pol., *Sex Offender Sentencing in Washington State: Special Sex Offender Sentencing Alternative Trends* (Jan. 2006), <http://www.wsipp.wa.gov/rptfiles/06-01-1205.pdf>.

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See *Public Opinion and the Criminal Justice System: Building Support for Sex Offender Management Programs*, *supra* note 45.

offenders and the interests of the public. In contrast, the legislation promulgated in the United States appears to be based solely on disputed views of the dangerousness of sex offenders in the community.²⁰⁵

Several studies have called into question the effectiveness and economic burden of registration and community notification.²⁰⁶ The dearth of positive results from community notification gives more credence to the possibility that community notification is an inadequate form of protection and possibly unconstitutional. If the Supreme Court adopted a fundamental rights analysis, then there is a significant argument that community notification is not narrowly tailored to the goal of keeping the public safe. Further, the complete lack of research regarding the civil commitment of sexually violent predators is problematic considering the lack of adequate procedural protections and the low burden of proof in the federal statute.

These considerations tip the scale toward reforming sex offender laws in the United States to something more like the United Kingdom's approach. In order to effectuate a positive change, three adjustments need to be made. First, the United States should prohibit community notification. However, registration laws have shown some benefit, so continuing to provide sex offender information to the police should persist. Second, the United States should re-examine the civil commitment provisions in the Walsh Act. Any additions to the Act should ensure that strict procedural standards are in place and create a higher burden proof. Finally, the United States should include some unconventional approaches to future sex-offender legislation. Including these provisions will be beneficial in helping sex offenders reintegrate into society. Without implementing these—or other similar—changes, the United States will continue on the path of blatantly disregarding the rights of many of its citizens.

²⁰⁵ See Radford, *supra* note 3.

²⁰⁶ See WASH. INST. FOR PUB. POL., *supra* note 43.

Penn State Journal of Law & International Affairs

2013

VOLUME 2 No. 2

THE CASE OF CHRISTMAS ISLAND: HOW INTERNATIONAL LAW AFFECTS THE AUSTRALIAN-MALAYSIAN REFUGEE DEAL

*Ria Pereira**

INTRODUCTION

In July of 2011, Australia and Malaysia entered an arrangement in which Australian asylum seekers would be removed to neighboring Malaysia to have their asylum claims processed.¹ Following widespread criticism in the media, Australia's High Court ("High Court" or "Court") ruled that such a deal violated Australia's refugee protection laws.² While this ruling should have put an end to the deal, Australia's Immigration Minister, Chris Bowen, indicated that the agreement might nevertheless be feasible.³ Policy makers

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¹ See Matt Siegel, *Plan to Deal With Seekers of Asylum Roils Australia*, N.Y. TIMES, Aug. 11, 2011, at A7.

² See Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32 (Austl.); British Broadcasting Corporation, *Australia Court Rules Out Refugee 'Swap' with Malaysia*, BBC NEWS, Aug. 31, 2011, <http://www.bbc.co.uk/news/world-asia-pacific-14727471>; Crystal Ja & Julian Drape, *Opponents Demand Government Rule Out Malaysia Deal*, SYDNEY MORNING HERALD, Sept. 7, 2011, <http://news.smh.com.au/breaking-news-national/oppn-demands-govt-rule-out-malaysia-deal-20110907-1jwh4.html>.

³ See Madeleine Coorey, *Australia's Malaysia Refugee Swap Under Fire*, AFP, Sept. 16, 2011, <http://www.google.com/hostednews/afp/article/ALeqM5g—>

proposed amending Australian domestic immigration laws to allow the deal to go forward unencumbered; and a bill to amend Australia's Migration Act was subsequently introduced.⁴

This comment addresses the conflict and interplay between Australia's internal laws and its international obligations. Part I of this comment describes the origin and structure of the Malaysian refugee deal.⁵ The existing legality of the third party schemes under Australia's current immigration system is then examined in Part II.⁶ The High Court has not only expounded on third party schemes in general, but has also ruled on the legality of the 2011 Malaysian deal. The High Court's holding and rationale is taken up in Part III.⁷ Given Australia's international obligations as a State Party to the United Nations Convention Relating to the Status of Refugees ("Refugee Convention" or "Convention"), Part IV and V will then explore the wrongfulness of such a deal under standards of international law and effective protection.⁸ To further this analysis, Part VI will examine Malaysia's treatment of refugees.⁹ As it currently stands, Australian law and international obligations are in agreement: the Malaysian deal would be improper. However, officials within the Australian government propose disrupting this synchronicity by amending the country's internal laws to allow for such a deal. It is thus necessary to look at how these two bodies of governance work in synergy. Part VII addresses whether amending Australia's Migration Act would fulfill the country's international obligations.¹⁰

The deal has significance for both Australia and the international community. The Australian government's continued insistence of the deal's legality, despite the High Court's ruling, presents a challenge to future asylum seekers in Australia. On a broader scale, the deal raises a question regarding the interplay

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⁴ *See id.*

⁵ *See infra* Part I.

⁶ *See infra* Part II.

⁷ *See infra* Part III.

⁸ *See infra* Part IV, V.

⁹ *See infra* Part VI.

¹⁰ *See infra* Part VII.

between domestic and international law.¹¹ The proposal of amending Australia's immigration laws is premised on the idea that domestic law trumps international obligations.¹² This rationale raises concerns about member states' obligations under the U.N. Refugee Convention.

I. THE MALAYSIAN DEAL AND ITS ORIGINS

Australia receives about two percent of the world's asylum claims.¹³ In 2010, only 8,250 immigrants applied as asylum seekers within the country.¹⁴ By comparison, 55,530 noncitizens sought asylum in the United States in 2010.¹⁵ However, it is not the lack of asylum seekers that have given rise to this controversy. Because of its proximity to Burma, Australia has become a popular destination for immigrants arriving by sea from Southeast Asia.¹⁶ Dubbed the "boat

¹¹ Scholars have recently addressed *Plaintiff M70/2011* and *Plaintiff M106 of 2011* in different lights. See Michelle Foster, *Reflections on a Decade of International Law: International Legal Theory: Snapshots From a Decade Of International Legal Life: The Implications Of the Failed 'Malaysian Solution': The Australian High Court and Refugee Responsibility Sharing At International Law*, 13 MELB. J. INT'L L. 395, 422 (2012) (explaining that, according to the Migration Act as it presently stands, any future offshore processing arrangement undertaken by Australia must accord with Australia's international legal obligations); see also Hannah Stewart-Weeks, *Out of Sight But Not Out of Mind: Plaintiff M61/2010E v. Commonwealth*, 33 SYDNEY L. REV. 831, 843-46 (2011) (arguing that the Migration Act would not necessarily have to be amended because section 198A(3) provides a way for the Minister to declare a country safe if it "meets relevant human rights standards in providing protection").

¹² See Katina Curtis, *No Deal Yet on Asylum Seekers*, SYDNEY MORNING HERALD, Dec. 23, 2011, <http://news.smh.com.au/breaking-news-national/no-deal-yet-on-asylum-seekers-20111223-1p7mm.html>.

¹³ See U.N. REFUGEE AGENCY, ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2010 15 (2011), <http://www.unhcr.org/4d8c5b109.html>.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See Tony Keim, *Accused People Smugglers' Boat Stranded at Sea*, THE COURIER-MAIL, Oct. 4, 2011, <http://www.couriermail.com.au/news/national/accused-people-smugglers-boat-stranded-at-sea-court-told/story-e6freooo-1226158318125>.

people,” these immigrants have garnered attention both in the media and within the Australian government.¹⁷

Christmas Island, an Australian territory located in the Indian Ocean, has been designated as an “excised offshore place.”¹⁸ On this island, unlawful noncitizens, who have come to Australia via “offshore entry,” are detained.¹⁹ On July 25, 2011, the Australian and Malaysian governments devised a plan by which 800 asylum seekers, who had yet to have their claims assessed in Australia, would be sent to Malaysia for processing.²⁰ The United Nations High Commissioner for Refugees (“the UNHCR”) would then evaluate these asylum seekers’ claims in Malaysia.²¹

The Australian government justified the deal as a valid exercise of power under sections 198(2) and 198A(1) of the Migration Act of 1958.²² Section 198(2) provides that an immigration officer must remove noncitizens who are determined to be unlawfully present “as soon as reasonably possible,” but does not indicate the location to which these Asylum seekers should be removed.²³ Section 198A further provides that Australia may remove “offshore entry person[s]” to safe third countries.²⁴ Under this provision, for a country to be a valid port, it must meet “relevant” human rights

¹⁷ Nick Butterly & Andrew Probyn Canberra, *Gillard Turns the Boat Jeat on Abbott*, THE WEST AUSTRALIAN, Sept. 24, 2011, <http://au.news.yahoo.com/thewest/a/-/breaking/10329656/gillard-turns-the-boat-heat-on-abbott/>.

¹⁸ See DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, FACT SHEET 81 - AUSTRALIA’S EXCISED OFFSHORE PLACES (2010).

¹⁹ See DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, *supra* note 19; see also Migration Act of 1958, (Cth) § 5(1) (Austl.) (defining a non-citizen as any individual who has been determined not to be an Australian citizen and an “offshore entry person” as a non-citizen who has entered unlawfully at an excised offshore place).

²⁰ See Plaintiff M70/2011 and Plaintiff M106 of 2011, (2011) HCA 32, at ¶ 8; Siegel, *supra* note 1.

²¹ See Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, [2011] HCA 32, at ¶ 8.

²² See *id.*

²³ Migration Act of 1958, (Cth) § 198(2) (Austl.).

²⁴ *Id.* § 198A(1).

standards.²⁵ Furthermore, such a third country must also provide protection to persons seeking asylum or returning to their countries of origin.²⁶

While on its face the deal represents an outsourcing scheme to avoid the consumption of government resources, justification for the deal has been political rather than administrative.²⁷ By refusing to house asylum seekers within Australia, the government hopes to deter immigrants from seeking illegal channels of entry.²⁸

While outsourcing refugee processing might appear to be an uncommon solution, this deal hardly marks the first time Australia has attempted to implement such a scheme.²⁹ In 2001, a Norwegian carrier ship, the *MV Tampa*, rescued 438 distressed Afghans from fishing vessels in international waters.³⁰ The rescued noncitizens subsequently sought asylum from the Australian government.³¹ On September 10, 2001, Australia's Minister of Defense and the President of the Republic of Nauru devised the "Pacific Solution", under which the asylum seekers were removed to the Polynesian island nation to have their claims processed.³²

²⁵ See *id.*

²⁶ See *id.*

²⁷ See Press Release, Australian Human Rights Commission, Sending Asylum Seekers To Malaysia Is Not The Answer To Addressing People Smuggling (July 25, 2011), http://humanrights.gov.au/about/media/media_releases/2011/61_11.html).

²⁸ See *id.*

²⁹ See Susan Kneebone, *The Pacific Plan: The Provision of "Effective Protection?"*, 18 INT'L J. REFUGEE L. 696 (2006); see also Savitri Taylor, *Protection Elsewhere/Nowhere*, 18 INT'L J. REFUGEE L. 283 (2006).

³⁰ See Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 13.

³¹ See *id.*

³² See Kneebone, *supra* note 30, at 696; Taylor, *supra* note 30 (for a discussion of Australia's previous third-country arrangements).

II. LEGALITY OF THIRD PARTY SCHEMES UNDER AUSTRALIA'S MIGRATION ACT

Australian officials have proposed that they can circumvent Australian law and allow for the third party deal by amending Australia's Migration Act.³³ An initial question therefore is whether the deal does in fact violate Australian law.

A 1992 amendment to Australia's Migration Act established grounds for the mandatory detention and removal of noncitizens.³⁴ Under the Migration Act, unlawful noncitizens detained under section 178 must be kept in immigration detention until they are removed from Australian borders.³⁵ If the noncitizen is given a final status determination of unlawful presence, s/he must then be removed "as soon as reasonably practical."³⁶

Australia's Migration Act provides for these asylum seekers to be sent to territories other than their countries of origin.³⁷ Under Section 91D of the Migration Act, such plans are designated as "safe third country" schemes.³⁸ The Minister of Immigration has the ability to designate a third country as being "safe," and thus a proper port of removal.³⁹ An asylum claimant, who has a right to reside in a third country, cannot validly apply for a visa based on protection in Australia.⁴⁰ In addition, Australia would not have any protection obligations to such an individual.⁴¹ Because a third country to which a person has residence ties will have the obligation of assessing his

³³ See Migration Legislation Amendment (Offshore Processing and Other Measures) of 2011, (Cth) (Austl.); see also Curtis, *supra* note 13.

³⁴ See Migration Act of 1958, (Cth) §§ 188-197 (Austl.).

³⁵ See *id.* §§ 177-78 (defining a 'designated person' who is to be detained).

³⁶ See Plaintiff M61 v. Minister for Immigration and Citizenship, (2010) 85 ALJR 133, 139-140 (Austl.).

³⁷ See Migration Act of 1958, (Cth) § 91D (Austl.).

³⁸ See *id.*

³⁹ See *id.* § 91D(3).

⁴⁰ See *id.* §§ 91C(1)(b)(ii), 91E.

⁴¹ See Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 45 (Austl.).

asylum claim, this provision prevents immigrants from “forum shopping” for the most lenient admissions system.⁴²

Section 198A of the Migration Act requires that a declaration be made in relation to the third country to which a migrant will be sent.⁴³ Australian courts have held that such a declaration must be made by the Minister of Immigration in “good faith.”⁴⁴ Furthermore, any declaration must be based on an objective evaluation that a designated country is “safe” to send migrants.⁴⁵ The declaration must also comport with obligations under the Refugee Convention.⁴⁶ For a country to be declared “safe,” migrants must be given protection both while their claims are being processed and after a final determination of their claims has been made.⁴⁷

III. THE HIGH COURT’S RESPONSE TO THE MALAYSIAN DEAL

While Australia’s Migration Act does allow for certain safe third country schemes,⁴⁸ the High Court has rejected its use in the present deal.⁴⁹ Up until the High Court’s ruling rejecting the Malaysian deal, Australian courts generally held that the third-party state need not be a party to the Refugee Convention before a transfer could take place.⁵⁰ However, in *Plaintiff M70 and M106*, the High Court ruled that Australia must consider the recipient country’s domestic laws and obligations under international law when declaring

⁴² Penelope Mathew, *Current Development: Australian Refugee Protection in the Wake of the Tampa*, 96 AM. J. INT’L L. 661, 672-673 (2002).

⁴³ See Migration Act of 1958, (Cth) § 198A(3) (Austl.).

⁴⁴ See *Minister for Immigration and Multicultural Affairs v. Eshetu*, (1999) 197 CLR 611, 654 (Austl.).

⁴⁵ See Migration Act of 1958, (Cth) § 198A(3) (Austl.) (establishing the criteria used to evaluate a third country as safe).

⁴⁶ See *id.* § 198A(3)(iv).

⁴⁷ See *id.* §§ 198A(3)(ii)-(iii).

⁴⁸ See *id.* § 91D.

⁴⁹ See *Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*, (2011) HCA 32 at ¶ 66-67.

⁵⁰ See, e.g., *Kola v. Minister for Immigration and Multicultural Affairs*, (2002) 120 FCR 170, 178 (Austl.).

a country to be “safe.”⁵¹ When confronted with the issue of whether Australia could deport asylum seekers to Malaysia for processing, the Court held that migrants, who claim a fear of persecution by their countries of origin, may only be taken from Australia pursuant to section 198A.⁵² If no power under section 198A exists, the person may only be validly removed once their claims are assessed and found to be lacking.⁵³ If, however, the migrant is ultimately determined to be a refugee, the person may only be removed pursuant to the non-refoulement provisions under section 198(2).⁵⁴

Section 198A requires certain standards to be met before offshore entry persons may be taken to a designated country.⁵⁵ A country of deportation must provide effective procedures for assessing asylum claims.⁵⁶ Protections must be afforded to refugees⁵⁷, as well as noncitizens who are waiting for their claims to be processed.⁵⁸ A third country must also meet “relevant” human rights standards in dispensing its protection to refugees and asylum seekers.⁵⁹

Previous High Court precedent supports the fact that the government owes a “protection obligation” to those asserting asylum claims under Article 36, Section 2 of the Migration Act.⁶⁰ Article 36 states that the criterion for a protection visa in Australia is that “the applicant for the visa is a noncitizen in Australia to whom Australia has a protection obligation under [the Convention].”⁶¹

⁵¹ See Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 66.

⁵² See *id.*

⁵³ See Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 54.

⁵⁴ See *id.* at ¶ 51.

⁵⁵ See Migration Act of 1958, (Cth.) § 198A(3)(a) (Austl.).

⁵⁶ See *id.* § 198A(3)(a)(i).

⁵⁷ See *id.* § 198A(3)(a)(ii).

⁵⁸ See *id.* § 198A(3)(a)(iii).

⁵⁹ See Migration Act of 1958, (Cth) § 198A(3)(a)(vi) (Austl.).

⁶⁰ See NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs, (2005) HCA 6, 213 ALR 668, at ¶ 42 (Austl.).

⁶¹ See Migration Act of 1958, (Cth) § 36(2) (Austl.).

In *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, the High Court explained the fundamental difference between those noncitizens who have entered the country and those who have not.⁶² Because customary international law involves rights between states rather than individuals, an asylum seeker cannot assert a right to enter a country where an individual is not a national.⁶³ However, Australia's Migration Act fills in the gap left by international law. Section 36(2) assumes that "obligation[s] are owed. . . by Contracting States to individuals" as well as to other member states.⁶⁴ Under Section 36(2), a protection obligation is owed to those who assert an asylum claim.⁶⁵ An asylum applicant can take himself out of the class of noncitizens to whom Australia owes a protection obligation under the Migration Act by committing certain crimes.⁶⁶ However, simply because a noncitizen has not had his asylum claim adjudicated does not mean that no protection obligations exist under Section 36.⁶⁷ Similarly, in *Plaintiff M61*, the Court explained that the Migration Act is premised on the idea that Australia has a "protection obligation to individuals."⁶⁸ The Court held that the Migration Act is structured in such a way that the international obligations towards refugees are mirrored by Australia's domestic law.⁶⁹

⁶² See *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) HCA 6, at ¶ 58.

⁶³ See *id.*

⁶⁴ *Id.* at ¶ 27; see also Migration Act of 1958, (Cth) § 36(2) (Austl.).

⁶⁵ See Migration Act of 1958, (Cth.) § 36(2) (Austl.); *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] HCA 6, at ¶ 33.

⁶⁶ See Migration Act of 1958, (Cth) § 91U (Austl.); see also Migration Reform Act of 1992, (Cth) § 4(b) (Austl.).

⁶⁷ See *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) HCA 6, at ¶¶ 2, 9 (Austl.).

⁶⁸ *Plaintiff M61 v. Minister for Immigration and Citizenship*, (2010) 85 ALJR at 139.

⁶⁹ *Id.*

IV. LEGALITY IN LIGHT OF AUSTRALIA'S INTERNATIONAL OBLIGATIONS UNDER THE REFUGEE CONVENTION

In order to be consistent with the principles of the Refugee Convention, asylum seekers, who turn to foreign governments because their own countries are unable or unwilling to provide them with protection,⁷⁰ should be assured these governments will not in turn cast them out. Article 33 of the Refugee Convention adopts this idea of non-refoulement, stating that a contracting state will not “expel or return” a refugee to a country in which his life or freedom “would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁷¹

The principle of non-refoulement has long been espoused as a necessary protection for asylum seekers.⁷² On its face, the plain language of Article 33 prohibits refoulement to a refugee's country of origin, which poses a threat to his life or freedom.⁷³ However, the principle of non-refoulement under Article 33 has subsequently been extended to include a prohibition against chain refoulement.⁷⁴ If an asylum seeker is sent to a third country, it must not, in turn, deport the noncitizen back to the home from which he is seeking protection.⁷⁵ Third countries might likewise be improper if the noncitizen only temporarily resided in such a country and would therefore likely be deported for failing to establish residence ties.⁷⁶

The principle of non-refoulement extends past the Refugee Convention. The International Court of Justice (“ICJ”) has indicated that practices among countries that are widespread enough to constitute an international custom can be accepted as international

⁷⁰ Convention and Protocol Relating to the Status of Refugees, G.A. Res. 2198 (XXI), U.N. Doc. A/RES/57/187, at art. 1 (Dec. 18, 2001).

⁷¹ *See id.* at art. 2.

⁷² *See id.* at art. 33.

⁷³ *See id.*

⁷⁴ Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, ¶ 4, U.N. Doc. PPLA/2003/01 (Feb. 2003).

⁷⁵ *Id.*

⁷⁶ Convention and Protocol Relating to the Status of Refugees, *supra* note 71, at art. 33.

law.⁷⁷ The United Nations has declared that the principle of non-refoulement constitutes a rule of international customary law.⁷⁸ Because of the widespread incorporation of non-refoulement provisions in regional and worldwide treaties, the UN has asserted that the principle has come to constitute an international custom as well as a rule of international law.⁷⁹ The UNHCR further pointed to the inclusion of non-refoulement in the reaffirmed 1967 UN Declaration on Territorial Asylum as evidence that the principle has risen to the level of international customary law.⁸⁰

Two types of states exist in regards to non-refoulement obligations: those countries which are State Parties to the international human rights treaties; and those states which have not yet acceded to treaty obligations.⁸¹ For State Parties to the Refugee Convention, there is a delineated obligation under the treaty's language to protect asylum seekers from refoulement.⁸² For states, which are not parties to either the Refugee Convention or its protocol, the principle of non-refoulement must nevertheless be respected because it has attained the status of customary international law.⁸³ The ICJ has explained that states have an obligation to act in conformity with customary law on the international stage.⁸⁴ If a state deviates from such courses of conduct, it will be treated as being in breach of such rules, rather than as a forerunner in the creation of a

⁷⁷ See Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993, at art. 38, ¶ 1.

⁷⁸ See U.N. High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, Jan. 31, 1994, <http://www.unhcr.org/refworld/docid/437b6db64.html>.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.*

⁸³ See U.N. High Commissioner for Refugees, *supra* note 79.

⁸⁴ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 425 (June 27).

new international standard.⁸⁵ The state's action will be considered to be prima facie evidence that a rule has been violated.⁸⁶

Australia's High Court has extended the concept of non-refoulement to safe third country schemes.⁸⁷ In *NAGV*, the Minister of Immigration argued that the principle of non-refoulement under Article 33 of the Refugee Convention only protected noncitizens from deportation to their countries of origin.⁸⁸ Article 33, therefore, did not place any limitations on sending noncitizens to countries other than their homelands.⁸⁹ The High Court firmly rejected this reasoning.⁹⁰ The Court explained that non-refoulement was a broad enough concept to include protection from asylum seekers being sent to countries where their lives or freedoms would be threatened.⁹¹ The Court further explained that Article 33 of the Refugee Convention should also be read in the negative.⁹² Thus, if a country is "bound by a non-refoulement obligation" with respect to a given asylum applicant, and there is no country to which the applicant can be removed without the obligation being breached, "the State in question has no choice but to tolerate that individual's presence within its territory."⁹³ Thus, a state might have an obligation to

⁸⁵ *See id.*

⁸⁶ *See id.* at 427.

⁸⁷ *See NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) HCA 6, at ¶ 25.

⁸⁸ *See id.* at ¶ 24.

⁸⁹ *See id.*

⁹⁰ *See id.* at ¶ 91 ("If the Minister's argument were accepted... it would seem to follow that Australia would never have owed protection obligations to any person.").

⁹¹ *See NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) HCA 6, at ¶ 25; *see also* U.N. High Commissioner For Refugees, *The Scope And Content of the Principle Of Non-Refoulement*, June 20, 2001, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b33574d1> (discussing how third country schemes fall under the auspices of Article 33 of the Convention. Not only does Article 33 require that a State Party consider whether a claimant's life and freedom would be threatened, but also the possibility of chain migration).

⁹² *See NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) HCA 6, at ¶ 23.

⁹³ *Id.* at ¶ 22.

protect a noncitizen simply because no other proper and safe country exists.⁹⁴

While Australia must adhere to the Refugee Convention's non-refoulement principles, the High Court has held that third country schemes are not per se prohibited under the terms of the Convention.⁹⁵ In *Thiyagarajah*, a Sri Lankan applicant in Australia had previously been granted refugee status and permanent residence in France.⁹⁶ The respondent was furthermore eligible to apply for French citizenship.⁹⁷ The High Court held that, because France would provide effective protection to the respondent, deporting him to the third country was consistent with Australia's obligations under the Convention.⁹⁸ The Federal Court subsequently expanded on the High Court's reasoning, holding that a safe country could be designated by an applicant having minimal ties to a territory, such as being granted a temporary right to re-enter a third country.⁹⁹

The UNHCR has similarly explained that safe third country schemes do not represent a violation of a State Party's obligations under the Convention.¹⁰⁰ The Executive Committee of the UNHCR has conceded that if an asylum seeker has preexisting "connection[s] or close links" with another state, deportation to that country might be allowed.¹⁰¹ The appropriateness of this deportation, however, is dependent on whether it is "fair and reasonable" to expect the applicant to first request asylum from the third country.¹⁰²

⁹⁴ See *id.*

⁹⁵ See *Minister for Immigration and Multicultural Affairs v. Thiyagarajah*, (1997) 80 FCR 543, 563 (Austl.).

⁹⁶ See *id.* at 565.

⁹⁷ See *id.*

⁹⁸ See *id.* at 563.

⁹⁹ See *Rajendran v. Minister for Immigration and Multicultural Affairs*, 1998 AUST FEDCT LEXIS 651, ¶ 11 (Austl.).

¹⁰⁰ See U.N. Human Right Commission, *Refugees Without an Asylum Country*, Conclusion No. 15 (XXX), (A/34/12/Add.1) (Oct. 16, 1979) [hereinafter *Refugees Without an Asylum Country*].

¹⁰¹ *Id.*

¹⁰² See *Minister for Immigration and Multicultural Affairs v. Thiyagaraja*, (1997) 80 FCR at 563.

V. EFFECTIVE PROTECTION UNDER INTERNATIONAL LAW

Australian courts have clearly interpreted the Convention to allow for the deportation of noncitizens who have valid claims to asylum.¹⁰³ However, previous case law indicates that a third country must be able to provide an asylum seeker with effective protection.¹⁰⁴ The High Court in *Thiyagarajah* ultimately held that France was a proper third country to which the noncitizen could be deported without a substantive consideration of his asylum claim.¹⁰⁵ But, the determining factor in the case was not only that the respondent had previously been granted status in France, but also that the third country would provide him with effective protection.¹⁰⁶ The High Court affirmed the reasoning of the Full Court when it noted that it was highly unlikely that the applicant would be in danger of chain refoulement if deported to France.¹⁰⁷

Effective protection is a safeguard designed to protect not only noncitizens who have already been granted asylum but also applicants who assert asylum claims.¹⁰⁸ Claiming a credible fear from a country of origin affords an applicant with certain minimum safeguards while their claims are being adjudicated.¹⁰⁹ The means by which these safeguards are provided are left open by the terms of the Refugee Convention.¹¹⁰ The UNHCR has acknowledged that varying

¹⁰³ *See id.*

¹⁰⁴ *See generally* Rajendran v. Minister for Immigration and Multicultural Affairs, (1998) 86 FCR 526 (Austl.).

¹⁰⁵ *See* Minister for Immigration and Multicultural Affairs v. Thiyagaraja, (1997) 80 FCR at 563.

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*; *see generally* Rajendran v. Minister for Immigration and Multicultural Affairs, (1998) 86 FCR 526 (Austl.).

¹⁰⁸ *See* U.N. Refugee Agency, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, at 2-3 (Jan. 26, 2007), <http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf>.

¹⁰⁹ *See id.*

¹¹⁰ *See* U.N. Human Right Commission, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, line 191, HCR/IP/4/Eng/REV (1992) [hereinafter *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*].

methods of adjudicating claims, including integrating the processing of asylum claims into the general immigration system, might nevertheless be in line with a country's obligations under the Refugee Convention.¹¹¹

While each State Party is given leave to implement its own procedures for adjudicating claims based on its particular judicial and administrative structure,¹¹² the UNHCR has nevertheless promulgated minimum procedural standards which must be met.¹¹³ The Executive Committee of UNHCR has explained that "fair and effective protection" includes procedures minimally sufficient to allow for the identification of noncitizens that should benefit from protection under the terms of the Refugee Convention.¹¹⁴ For example, it is not sufficient to designate a third country as "safe" based solely on whether that country is a State Party to the Refugee Convention.¹¹⁵ Instead, a hallmark of effective protection is whether a third country's asylum processing system is fair to applicants.¹¹⁶ The U.N.'s General Counsel has recommended that a fair system of asylum adjudication must include a determination of claims by an impartial authority and an effective system of appeal.¹¹⁷

At the twenty-eighth session of the High Commissioner's Programme in October, 1977, the Executive Committee delineated certain minimum procedural requirements that would constitute effective protection of asylum applicants.¹¹⁸ Asylum seekers should first and foremost be given necessary information about the procedures they need to follow to assert asylum claims.¹¹⁹ Interpreters should be provided to applicants while they are submitting their

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *Refugees Without an Asylum Country*, *supra* note 101, at 2.

¹¹⁴ See *id.*

¹¹⁵ See Legomsky, *supra* note 75, at 7.

¹¹⁶ See *Refugees Without an Asylum Country*, *supra* note 101.

¹¹⁷ See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 111, at line 192.

¹¹⁸ See U.N. High Commissioner for Refugees, *Determination of Refugee Status*, No. 8 (XXVIII), A/32/12/Add.1 (Oct. 12, 1977).

¹¹⁹ See *id.* at e(ii).

claims to the appropriate officials.¹²⁰ While countries often do not recognize the right of an applicant to have appointed counsel, noncitizens seeking asylum should nevertheless be granted an adequate opportunity to obtain counsel.¹²¹ Finally, while an applicant's claim is pending an initial determination or appeal, the asylum seeker should not be removed from the country from which he is seeking protection.¹²²

Under best practice procedures, a determination of whether a country is "safe" and will provide asylum seekers effective protection should be individualized.¹²³ An examination should be conducted by a state to determine whether the third country would not apply more restrictive criteria in adjudicating a particular claim than the country the applicant is already in.¹²⁴ The Executive Committee of the UNHCR has acknowledged that the prevailing legal standard among countries places the burden of proof in establishing asylum on the noncitizen submitting the claim.¹²⁵ However, asylum applicants rarely flee their homelands carrying documentation of their persecution.¹²⁶ Given that the sole evidence for many applicants will be their own testimony, the Executive Committee has explained that the duty to ascertain all relevant facts is shared between an applicant and

¹²⁰ See *id.* at e(iv).

¹²¹ See *id.*

¹²² See *id.* at e(vii).

¹²³ See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 111, at line 29; see also Joanne van Selm, *Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits'*, UNHCR, June 2001, <http://www.unhcr.org/cgi-bin/tehis/vtx/home/opendocPDFViewer.html?docid=3b39a2403> (discussing how countries are classified as safe under the human rights obligations of the European Union).

¹²⁴ See U.N. High Commissioner for Refugees, *Asylum Processes (Fair and Efficient Asylum Procedures)*, ¶ 4, EC/GC/01/12 (May 31, 2001).

¹²⁵ See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 111, at line 196.

¹²⁶ See U.N. High Commissioner for Refugees, *UNHCR Annotations for Articles 1 to 19 of the Draft Council Directive on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, Dec. 2002, at 6, <http://www.unhcr.org/refworld/docid/437cafaa4.html>.

government examiners.¹²⁷ For a country to have effective procedural protections, the system of adjudicating claims must take into account and make allowances for unsupported yet credible statements by applicants.¹²⁸

The UNHCR does not stand alone in its emphasis on the effective processing of asylum claims. The ICJ has similarly linked the principle of non-refoulement to a third country having an adequate system of adjudicating asylum claims.¹²⁹ In *M.S.S. v. Belgium and Greece*, a noncitizen claiming asylum from Afghanistan entered the European Union through Greece.¹³⁰ The Afghani finally made his way to Belgium, where he was detained.¹³¹ He was then transferred back to Greece to have his asylum claim processed.¹³² The Grand Chamber of the European Court of Human Rights held that Belgium breached its obligation of non-refoulement under Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (“ECHR”).¹³³ The court emphasized that shortcomings in a third country’s system of processing asylum claims alone could violate a deporting state’s international obligations of non-refoulement.¹³⁴ The court explained that Belgium “knew or ought to have known” that the noncitizen, when deported to Greece, had “no guarantee that his asylum application would be seriously examined by the Greek authorities.”¹³⁵ In designating Greece as an improper third country, the court pointed to deficiencies in the Greek system of processing asylum claims, including claimants not receiving adequate

¹²⁷ See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, *supra* note 111, at line 196.

¹²⁸ See *id.*

¹²⁹ See *M.S.S. v. Belgium and Greece*, App. No. 30696/09, Eur. Ct. H.R., 4 (2011), <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *id.* at 84 (2011).

¹³⁴ See *M.S.S. v. Belgium and Greece*, App. No. 30696/09, Eur. Ct. H.R., 75 (2011).

¹³⁵ *Id.* at 75; See also DEPARTMENT OF STATE, HUMAN RIGHTS REPORT: GREECE, 14(2010)(discussing the refugee protection system in Greece. Greece’s asylum system has been characterized as “gravely dysfunctional” in its identification of individuals seeking asylum and its processing of claims.).

information from Greek officials, a shortage of interpreters, and claimants not being given sufficient opportunity to secure legal aid.¹³⁶ Because of backlogs in the Greek asylum processing system, excessive delays in both initial asylum determinations and subsequent appeals were further indicated as negative factors in Greece's immigration system.¹³⁷

VI. MALAYSIA'S TREATMENT OF REFUGEES

International standards and safeguards indicate that a third country will be considered improper based on deficiencies in its processing of asylum claims alone.¹³⁸ For Malaysia to therefore constitute a proper third country, standards of protection articulated by the international community must be met.¹³⁹ In order to determine whether Malaysia would constitute an effective third country, it is necessary to examine Malaysia's system of processing asylum claims, as well as its treatment of asylum seekers.

One of the initial and resounding objections by the media to the Malaysian deal was that Malaysia had yet to become a member of the Refugee Convention.¹⁴⁰ Being a member of the Convention does not simply mean that a country acknowledges the need to uphold human rights standards for those seeking asylum.¹⁴¹ The UNHCR also casts a net of supervision¹⁴² over the member states.¹⁴³ The regulations put in place by the Convention were designed to provide a uniform system of asylum protection and adjudication between

¹³⁶ See *M.S.S. v. Belgium and Greece*, App. No. 30696/09, Eur. Ct. H.R., 111 (2011).

¹³⁷ See *id.* at 39.

¹³⁸ See *id.* at 75.

¹³⁹ See *id.*

¹⁴⁰ See British Broadcasting Corporation, *supra* note 2; see also Ja & Drape, *supra* note 2.

¹⁴¹ See Convention and Protocol Relating to the Status of Refugees, *supra* note 71, at 2.

¹⁴² See *id.* at 4.

¹⁴³ See Michelle Foster, *Protection Elsewhere: The Legal Implications of Requiring Refugees To Seek Protection in Another State*, 28 MICH. J. INT'L L. 223, 283 (2007).

member states.¹⁴⁴ In fact, the concept of safe third countries originated as a way for member states with common protection obligations to share the burden of processing asylum claims.¹⁴⁵

Because Malaysia is not a State Party to the Refugee Convention, it does not have an obligation to comply with the minimum protections listed in the treaty as would a member state.¹⁴⁶ Moreover, the country does not legally recognize the status of “refugee” under its domestic laws.¹⁴⁷ The UNHCR has indicated that the country does not have any “constitutional, legislative or administrative provisions dealing with the right to seek asylum or the protection of refugees.”¹⁴⁸ This lack of legal recognition means that a system has not been established for providing protection for the specific processing and protection needs of refugees.¹⁴⁹ No protection is provided for noncitizens that are ultimately determined to be unlawful and expelled to their countries of origin.¹⁵⁰

Under Malaysian law, anyone entering the country without appropriate documentation is subject to mandatory imprisonment for a maximum period of five years and a fine not exceeding RM10,000 (approximately \$3,000 USD).¹⁵¹ Under Section 6 of Malaysia’s Immigration Act of 1959/63, an unlawful noncitizen is also subject

¹⁴⁴ See Plaintiff M70/2011 and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship, (2011) HCA 32, at ¶ 117 (“What is clear is that signatories to the Refugees Convention and the Refugees Protocol are bound to accord to those who have been determined to be refugees the rights that are specified in those instruments including the rights earlier described.”).

¹⁴⁵ See *id.* at ¶ 19.

¹⁴⁶ See U.N. High Commissioner for Refugees, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, Apr. 2011, <http://www.unhcr.org/3b73b0d63.html>.

¹⁴⁷ See DEPARTMENT OF STATE, HUMAN RIGHTS REPORT: MALAYSIA, 27 (2010).

¹⁴⁸ U.N. High Commissioner for Refugees, *UNHCR’s Views On The Concept of Effective Protection As It Relates To Malaysia*, Mar. 2005, at 1, <http://www.unhcr.org/au/pdfs/Malaysia.pdf> [hereinafter *UNHCR’s Views On The Concept of Effective Protection As It Relates To Malaysia*].

¹⁴⁹ See DEPARTMENT OF STATE, HUMAN RIGHTS REPORT: MALAYSIA, at 27 (2010) [hereinafter HUMAN RIGHTS REPORT: MALAYSIA].

¹⁵⁰ See *id.* at 28.

¹⁵¹ See Immigration Act 1959/63, § 6(3)(Malaysia).

to whipping of not more than six strokes.¹⁵² Since the Malaysian Immigration Act was amended in 2002, the Malaysian government reported in June 2009 that 47,914 noncitizens had been subjected to physical punishment for immigration offenses.¹⁵³ Amnesty International has similarly estimated that as many as 10,000 immigrant prisoners are caned in the country annually.¹⁵⁴

In some ways, the Malaysian government has not been blind to the holes existing in its immigration policy. The UNHCR has noted that Malaysia has shown a “considerable degree of cooperation” with UNHCR officials.¹⁵⁵ The country has not impeded humanitarian organizations that enter the country and provide assistance to the refugee population.¹⁵⁶ Those already granted refugee status by the UNHCR are not deported and are generally given preferential treatment in detention centers.¹⁵⁷ Likewise, those with UNHCR cards were given access to health care and limited access to NGO clinics.¹⁵⁸ The country, however, does not provide access to formal education, even to noncitizens with UNHCR cards.¹⁵⁹

Yet, this situational compliance does not alleviate the broader and deeper problems in Malaysia’s refugee policy. In the Annual World Refugee Survey, the UNHCR characterized Malaysia’s refugee processing as a system comprised of “arbitrary arrest[s], detention[s] and deportation[s]” of refugees.¹⁶⁰ Malaysia’s immigration system furthermore does not seem to take into account the danger of chain refoulement.¹⁶¹ The UNHCR noted that during 2008, Malaysia

¹⁵² *See id.*

¹⁵³ *See* HUMAN RIGHTS REPORT: MALAYSIA, *supra* note 150, at 26.

¹⁵⁴ *See* AMNESTY INT’L, A BLOW TO HUMANITY—TORTURE BY JUDICIAL CANING IN MALAYSIA 5 (2010).

¹⁵⁵ UNHCR’s *Views On The Concept of Effective Protection As It Relates To Malaysia*, *supra* note 149, at 1.

¹⁵⁶ *See* HUMAN RIGHTS REPORT: MALAYSIA, *supra* note 150, at 27.

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 28.

¹⁶⁰ U.S. Committee for Refugees and Immigrants, *World Refugee Survey 2009 – Malaysia*, June 17, 2009, <http://www.unhcr.org/refworld/docid/4a40d2adc.html>.

¹⁶¹ *See id.*

deported at least 1,000 asylum seekers to Thailand, which has been known to refole noncitizens to Myanmar.¹⁶²

Malaysia's adjudication of asylum claims has been criticized as including inconsistencies and corruption. In the 2008 Annual World Refugee Survey, the UNHCR described how authorities in immigration holding facilities do not permit detainees to make phone calls upon their arrest.¹⁶³ In order to inform anyone of their arrest or to seek aid, the detainees generally had to bribe police officers.¹⁶⁴ Malaysia also has a history of not following the letter of its international obligations.¹⁶⁵ Despite Malaysia being a State Party to the Convention on the Rights of the Child, the country does not provide primary education opportunities or free health services to most asylum seeking children.¹⁶⁶ The UNHCR has further observed that the country has failed to consistently implement political decisions, specific laws and regulations or even oral agreements with the UNHCR to establish a system of refugee protection and evaluation.¹⁶⁷

Malaysia's deficiencies in asylum processing act as a counterexample to what the international community characterizes as a safe third country. Similar to the International Court of Justice's reasoning in *M.S.S. v. Belgium and Greece* that a third country was improper because there was no guarantee that asylum applications would be considered fairly and properly due to processing deficiencies,¹⁶⁸ the failure of the Malaysian system to protect against the dangers of internal corruption and chain refoulement suggest that Malaysia would not be a proper third country.¹⁶⁹ Furthermore, similar to the reasoning of the UNHCR that hallmarks of a safe third country include applicants being given information about their

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *World Refugee Survey 2009 – Malaysia*, *supra* note 161.

¹⁶⁶ See *id.*

¹⁶⁷ See UNHCR's *Views On The Concept of Effective Protection As It Relates To Malaysia*, *supra* note 149, at 1.

¹⁶⁸ See *M.S.S. v. Belgium and Greece*, App. No. 30696/09, _Eur. Ct. H.R. at 84.

¹⁶⁹ See *World Refugee Survey 2009 – Malaysia*, *supra* note 161.

process and access to a fair and impartial system of asylum determination and appeal,¹⁷⁰ reports indicating that detainees must resort to bribery to gain access to outside resources intimate that Malaysia lacks the internal system needed to meet international standards.¹⁷¹

VII. CAN DOMESTIC REGULATIONS TRUMP INTERNATIONAL OBLIGATIONS?

Australia's Constitution dictates that treaty ratification is the function of the Commonwealth Executive,¹⁷² while the passage of laws affecting the Commonwealth is a function of the Commonwealth Parliament.¹⁷³ Because of this separation of powers, a treaty is not incorporated into domestic law unless it is implemented by legislation.¹⁷⁴ This concept has traditionally been known as dualism.¹⁷⁵ A dualist system requires international laws to be translated to domestic regulations in order to take effect.¹⁷⁶ Without such execution, litigants would have no cognizable claim in national courts based on international provisions.¹⁷⁷

In the vast majority of cases, statutory construction circumvents problems related to incorporation.¹⁷⁸ It is uncontroverted that a country has the sovereign power to determine the means by which international agreements are implemented

¹⁷⁰ See *Refugees Without an Asylum Country*, *supra* note 101.

¹⁷¹ See *World Refugee Survey 2009 – Malaysia*, *supra* note 161.

¹⁷² See AUSTRALIAN CONSTITUTION § 61; see also Department of Foreign Affairs and Trade, *Treaties and Treaty Making* (2011), <http://www.dfat.gov.au/treaties/making/making2.html>.

¹⁷³ See AUSTRALIAN CONSTITUTION § 1.

¹⁷⁴ See Department of Foreign Affairs and Trade, *supra* note 173.

¹⁷⁵ See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 323; see also Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *generally* Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 183 CLR at 273, 32 ALD 420 (Austl.).

domestically.¹⁷⁹ The principle that ambiguities in legislation should be construed in accordance with treaty obligations circumvents the majority of conflicts between the international and domestic fields.¹⁸⁰ However, under a system that requires incorporation for treaty provisions to take on the force of law, it is theoretically possible to change the direct obligations which a treaty would impose by amending Australian domestic law.

Just such an amendment was proposed after the High Court ruled against the Malaysian deal.¹⁸¹ On September 21, 2011, a bill to amend the Migration Act of 1958 was introduced in the Australian House of Representatives.¹⁸² The purpose of this bill was to “replace the existing framework in the Migration Act for taking offshore entry persons to another country.”¹⁸³ The bill called for the repeal of section 198A, the basis for the High Court’s 2011 ruling against the Malaysia deal.¹⁸⁴ In place of this component, a new section would provide that “the designation of a country to be an offshore processing country need not be determined by reference to the international obligations or domestic law of that country.”¹⁸⁵

The proposed amendment to the Migration Act would circumvent the specific ruling of the High Court which disallowed the Malaysian deal.¹⁸⁶ However, case law indicates that despite this incorporation requirement, treaties still impose some indirect

¹⁷⁹ See *id.*; *Kartinyeri v. Commonwealth*, (1998) 195 CLR 337, 384 (Austl.); see also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), ¶ 2, U.N. Doc. A/6316 (Mar. 23, 1976) (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”).

¹⁸⁰ See generally *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 CLR at 273.

¹⁸¹ See Migration Legislation Amendment (Offshore Processing and Other Measures) of 2011, (Cth)(Austl.).

¹⁸² See *id.*

¹⁸³ *Id.* at 2.

¹⁸⁴ See *id.* at 17.

¹⁸⁵ *Id.*

¹⁸⁶ See Department of Foreign Affairs and Trade, *supra* note 173.

obligations absent being implemented by legislation.¹⁸⁷ In *Minister for Immigration and Ethnic Affairs v. Teoh*, a Malaysian immigrant was ordered deported after being convicted of possessing heroin.¹⁸⁸ The Federal Court held that the deportation order had been improperly issued because of a failure to consider the hardship to Teoh's wife and her children if Teoh was refused legal status.¹⁸⁹ On review, the High Court affirmed the Federal Court's decision, reasoning that the Convention on the Rights of the Child required the hardship suffered by the children to be considered.¹⁹⁰ The High Court's reasoning can be applied not only to the Convention on the Rights of the Child, but also to other treaties to which Australia is a State Party.¹⁹¹ The High Court reasoned that, while international agreements must be incorporated into domestic law to have effect, ratification alone holds significance.¹⁹² The High Court held that Australia's ratification of an international agreement raised a "legitimate expectation" that the standards set forth in the treaty would be followed.¹⁹³ Absent a "statutory or executive indication to the contrary," the obligations and rights annunciated in treaties are treated as directives on government policy.¹⁹⁴

Teoh contains no reference to what would constitute adequate "statutory or executive indication to the contrary." Here, subsequent Australian case law is instructive. In *Tien v. Minister for Immigration and Multicultural Affairs*, the Court interpreted sufficient "indications to the contrary" to refer to statements made at the time a treaty is entered into, "rather than to statements made years after the treaty came into force."¹⁹⁵ Take the case of *Baldini v. Minister for Immigration*

¹⁸⁷ See *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 CLR at 293.

¹⁸⁸ See *id.* at 279.

¹⁸⁹ See *id.* at 281.

¹⁹⁰ See *id.* at 293.

¹⁹¹ See *id.* at 301.

¹⁹² See *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 CLR at 301.

¹⁹³ See *id.* at 275-76.

¹⁹⁴ See *id.* at 274.

¹⁹⁵ *Tien v. Minister for Immigration and Multicultural Affairs*, (1998) 53 ALD 32 (Aust.).

and *Multicultural Affairs* as a counter-example.¹⁹⁶ In this case, a Ministerial Direction under s 499 of the Migration Act of 1958 was at issue.¹⁹⁷ The Ministerial Directions indicate that the best interest of a child should be taken into account only in cases involving parental relationships.¹⁹⁸ These Directions provide a narrower best interest analysis than provided for under the Convention on the Rights of the Child.¹⁹⁹ Nevertheless, the Court found that the Ministerial Direction provided sufficient “executive indication to the contrary.”²⁰⁰ The take-away from post-*Teoh* interpretations of “statutory or executive indication to the contrary” is that such indication must be clear and must exist at the time that international obligations are reduced to domestic law.

Recent years have seen a retreat from the ruling in *Teoh*. Only a few short weeks after *Teoh*’s ruling, Australia’s then-existing Attorney General and Minister of Foreign Affairs issued a joint statement denouncing the High Court’s reasoning that unincorporated treaties impose a “legitimate expectation” under domestic law.²⁰¹ What followed included not only multiple attempts to overturn the decision in the Australian Parliament, but also a retreat by the High Court itself from its language in *Teoh*.²⁰² In *Ex*

¹⁹⁶ See *Baldini v. Minister for Immigration and Multicultural Affairs*, (2000) FCA 173, ¶ 4; see also Wendy Lacey, *In the Wake of Teoh: Finding Appropriate Government Response*, 29 Fed. L. Rev. 219 (2001) (for a discussion of *Baldini* and its impact on post-*Teoh* legislation).

¹⁹⁷ See *Baldini v. Minister for Immigration and Multicultural Affairs*, (2000) FCA 173, ¶ 4.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.* at ¶ 30.

²⁰⁰ See *id.*

²⁰¹ See Joint Statement from the Minister for Foreign Affairs and the Attorney General, *International Treaties and the High Court Decision in Teoh*, May 10, 1995; Joint Statement from the Minister for Foreign Affairs and the Attorney General and Minister for Justice, *The Effect of Treaties in Administrative Decision-Making*, Feb. 25, 1997.

²⁰² See The Administrative Decisions (Effect of International Instruments) Bill of 1995, (Cth)(Austl.); Administrative Decisions (Effect of International Instruments) Bill of 1997, (Cth)(Austl.); Administrative Decisions (Effect of International Instruments) Bill of 1999, (Cth) (Austl.); See also Administrative Decision (Effect of International Instruments) Act of 1996 (SA) (Austl.) (Southern Australia, as opposed to the Commonwealth, has enacted legislation which invalidates *Teoh*’s language).

parte Lam, a noncitizen who had established a family in Australia was subject to deportability based on a number of criminal convictions.²⁰³ Based on the precedent in *Teoh*, it appeared that there was a “legitimate expectation” that the best interests of the children who would be left behind should be taken into account to comport with Australia’s treaty obligations.²⁰⁴ The High Court, however, expressed reservations about the language in *Teoh*.²⁰⁵ The notion was reiterated that, in the Australian system, treaty obligations that have not been enacted by legislation are not self-executing.²⁰⁶ The High Court suggested that *Teoh* might represent an incompatibility to this principle.²⁰⁷ *Teoh*’s continued significance, the High Court suggested, would depend on the limitations that are to be placed on the case’s language and on “the basis upon which *Teoh* rests.”²⁰⁸

Despite a retreat at both the political and judicial levels, *Teoh* still represents good law in the Commonwealth.²⁰⁹ Furthermore, decisions by the Administrative Appeals Tribunal indicate that lower courts continue to follow the High Court’s reasoning in *Teoh*.²¹⁰ In *Yad Ram v. Department of Immigration and Ethnic Affairs*, the Tribunal reviewed the denial of an application for a spousal visa.²¹¹ The Tribunal applied *Teoh* and found that the spousal visa should be issued based on the best interests of a child who would be affected by the decision.²¹² While *Teoh* remains contentious within Australia, standards annunciated by the international community bolster the

²⁰³ See *In re Minister for Immigration and Multicultural Affairs; Ex parte Lam*, (2003) 214 CLR 1 (Austl.).

²⁰⁴ See *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 CLR at 291.

²⁰⁵ See *In re Minister for Immigration and Multicultural Affairs; Ex parte Lam*, (2003) 214 CLR 1 (Austl.).

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See MATTHEW GROVES & H. P. LEE, *AUSTRALIAN ADMINISTRATIVE LAW: FUNDAMENTALS, PRINCIPLES, AND DOCTRINES* 306 (2007).

²¹⁰ See *Department of Immigration and Ethnic Affairs v. Ram*, (1996) 69 FCR 431, 432 (Austl.).

²¹¹ See *id.* at 432.

²¹² See *id.* at 436.

High Court's decision.²¹³ The Vienna Convention on the Law of Treaties indicates that a country's domestic laws cannot provide a justification for an international treaty violation.²¹⁴ The International Law Commission of the United Nations has further indicated that a country's legislation being deemed 'wrongful' is governed by international law.²¹⁵ This character of "wrongfulness" is not affected if a law is deemed proper within a country.²¹⁶

The continued existence of *Teoh* indicates that amending Australia's domestic refugee law would not be an effective means to circumvent obligations under the Refugee Convention. As the High Court in *Teoh* indicated, while an amendment to the refugee processing system can properly alter the *means* by which asylum claims are adjudicated, the *ends* which result from the process must nevertheless comport with the standards and obligations delineated in the Refugee Convention.²¹⁷ Furthermore, international standards delineated by such instruments as the Vienna Convention on the Law of Treaties appear to specifically address and prohibit nations from circumventing their international obligations by changing their internal laws.²¹⁸ The weight of such standards indicates that any amendment designed to allow for an improper third party deal will be in violation of Australia's international obligations. While altering the Migration Act would overcome the immediate blockade by

²¹³ See, e.g., Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

²¹⁴ See *id.*

²¹⁵ See International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 3, 56 U.N. GAOR Supp. (No. 10) at 1, U.N. Doc. A/56/10 (2001) ("[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. a (1987) ("[F]ailure of the United States to carry out an obligation [of international law] on the ground of its unconstitutionality will not relieve the United States of responsibility under international law.").

²¹⁶ See *id.*

²¹⁷ See *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 CLR at 289.

²¹⁸ See Vienna Convention on the Law of Treaties, *supra* note 214, at art. 27.

overturning the High Court's 2011 ruling, international standards indicate that Australia would still violate its obligations under the Refugee Convention.

CONCLUSION

An amendment to Australia's Migration Act is not an antidote to the Malaysian deal. While amending Section 198A of the Migration Act has the effect of overturning the discrete High Court ruling declaring the Malaysian deal improper, Australia's international obligations remain.

Certain questions remain unanswered. The conclusions of this comment are based on the continued vitality of the High Court's holding in *Teoh* that Australia's ratification of an international treaty, in the absence of statutory or executive indication to the contrary, raises a "legitimate expectation" that the standards set forth in the treaty will be followed.²¹⁹ While *Teoh* still stands as good law in the Commonwealth, the High Court's language in *Lam* and the Executive's issuance of a statement denouncing *Teoh*, leave the "legitimate expectation" standard on shaky grounds.²²⁰

Further, only the shortcomings in third party schemes have been addressed. It has been argued that a country such as Malaysia, which is not a State Party to the Refugee Convention and whose system of immigration processing is riddled with problems, cannot constitute a proper third country. While this comment has suggested that certain standards of asylum processing might bring a country up to international standards of human rights, a discussion of what would generally be considered a safe third country is beyond the scope of this discussion.

²¹⁹ See *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 CLR at 289.

²²⁰ See *The Administrative Decisions (Effect of International Instruments) Bill of 1995*, (Cth)(Austl.); *Administrative Decisions (Effect of International Instruments) Bill of 1997*, (Cth)(Austl.); *Administrative Decisions (Effect of International Instruments) Bill of 1999*, (Cth)(Austl.).

The Refugee Convention emphasizes that its State Parties are sovereign states which are nevertheless part of an international community.²²¹ While the means by which protection is provided to refugees is the province of domestic law, to determine the ends that are ultimately met a member state must look outwards to its role as an actor on the international stage.

²²¹ See UNHCR, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: Signing On Could Make All The Difference*, UN REFUGEE AGENCY (Aug. 2001), <http://www.unhcr.org/3bbdb0954.html>.

Penn State Journal of Law & International Affairs

2013

VOLUME 2 NO. 2

PROTECTING SHAREHOLDERS FROM THEMSELVES: HOW THE UNITED KINGDOM'S 2011 TAKEOVER CODE AMENDMENTS HIT THEIR MARK

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INTRODUCTION

American food conglomerate Kraft Foods' four-month-long, hostile-turned-friendly takeover of British icon Cadbury,¹ met with outcries from unions, politicians, and the general public.² The uproar led to major changes in the United Kingdom's City Code on

^{*} J.D. Candidate, 2013, Dickinson School of Law, Pennsylvania State University. I would like to thank the JLIA editorial board from the graduating classes of 2012, 2013, and 2014 for all of their help in the writing, revising, and editing processes. I would like to thank Professor Sam Thompson for the inspiration for this piece. I would like to thank Dean Amy Gaudion for making me a better a legal writer and editor. And finally, I would like to thank my Grandfather, my Mom & Dad, and Colleen Kasprzak for their continued love and support throughout law school and particularly through the long nights associated with writing for a journal.

¹ See *TIMELINE-Kraft Agrees to Cadbury Deal After 4-month Fight*, REUTERS, Jan. 19, 2010, <http://www.reuters.com/article/2010/01/19/cadbury-kraft-idUSLDE60E0XI20100119> [hereinafter *TIMELINE*].

² See David Jones & Brad Dorfman, *Kraft Snares Cadbury for \$19.6 Billion*, REUTERS, Jan. 19, 2010, <http://www.reuters.com/article/2010/01/19/us-cadbury-idUSTRE60H1N020100119>. Much of the concern among the public was over two things: losing Cadbury, a uniquely British company, to a faceless giant of a company; and over the potential loss of jobs, which occurs after almost any merger when the two newly merged companies start consolidating operations and work forces.

Takeovers and Mergers (“Takeover Code”).³ Within eighteen months of the takeover, The Code Committee (“The Code Committee” or “The Committee”) of The Panel on Takeovers and Mergers (“the Takeover Panel” or “The Panel”) amended the Takeover Code. The Committee’s change corrected the perceived imbalance of power in favor of bidders in a takeover attempt.⁴ It is unclear, however, whether this inequity was as threatening as the public outcry made it seem.⁵ Rather, The Code Committee may have succumbed to political pressures by creating amendments that protect target companies at the expense of target company shareholders.⁶ Moreover, some large law firms hypothesized that the new Code amendments would deter some potential bidders from ever pursuing a target company, thereby chilling the mergers and acquisitions (“M&A”) market and reducing potential sale proceeds to target shareholders.⁷ On the other hand, “short-term” investors can unduly influence hostile bids.⁸ Therefore, in practice, the

³ See generally THE PANEL ON TAKEOVERS AND MERGERS, THE CITY CODE ON TAKEOVERS AND MERGERS (10th ed. 2011), <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf> [hereinafter *Takeover Code*].

⁴ THE PANEL ON TAKEOVERS AND MERGERS, REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS, 2010, Consultation Paper Issued by The Code Committee of The Panel PCP 2010/2, 4, <http://www.thetakeoverpanel.org.uk/wpcontent/uploads/2008/11/PCP201002.pdf> [hereinafter *Consultation Paper*].

⁵ See generally Michael R. Patrone, *Sour Chocolate? Cadbury/Kraft and the 2011 Proposed Amendments to the U.K. Takeover Code – A Call for Further Research*, 8 BYU INT’L L. MGMT. R. 63, 66 (2011), http://www.law2.byu.edu/ilmr/articles/winter_2011/BYU_ILMR_winter_2011_4_Chocolate.pdf. See also note 99.

⁶ See Patrone, *supra* note 5, at 65-66; *Takeover Code, Introduction*, ¶ 2(a) at A1 (stating that the shareholders are the primary constituents whom The Code seeks to protect).

⁷ See, e.g., Corporate Legal Alert, Mayer Brown, *Takeover Code Changes Published – Is This a New Era for UK Takeovers?* (July 2011) <http://www.mayerbrown.com/publications/Takeover-Code-changes-published—is-this-a-new-era-for-UK-takeovers-07-21-2011/>; Client Briefing, Clifford Chance, *Impact of UK Takeover Code Reform*, 10 (Sept. 15, 2011) http://www.cliffordchance.com/publicationviews/publications/2011/09/impact_of_uk_takeovercodereform.html.

⁸ See *infra* Part III.A. See also *Consultation Paper*, *supra* note 4, at 4 (describing “short-term” investors as those shareholders who become interested in

shareholders of the target company may not be protected to the extent The Code originally envisioned. This “short-term” investor problem was the primary problem the amendments intended to fix.⁹ Either way the amendments will likely substantially impact how a takeover bid will operate in the United Kingdom going forward.

This comment argues that The Code amendments will protect target company shareholders beyond the pre-amendment regime, without over-regulating and potentially harming other aspects of takeover practice. Had The Code Committee gone further by fully implementing¹⁰ the proposed idea of exempting “short-term” investors from voting on transactions,¹¹ the M&A market generally, and target shareholders specifically, would have been harmed in contravention of the principles¹² of the Takeover Code. Although the Takeover Panel appeared to react due to the public dismay, the amendments will serve the established shareholders of publically traded United Kingdom companies, and therefore strengthen the protections envisioned under the original spirit of The Code.¹³

Part I of this comment will briefly explore the history of the Kraft-Cadbury takeover and the resulting fervor surrounding the deal.¹⁴ Part II will discuss the traditional functions of the Takeover Panel and the Takeover Code.¹⁵ Part III will explain the four major

the shares of the target company only after a public announcement of a possible offer); *see also* Jean Eaglesham & Lina Saigol, *Mandelson Urges Radical Takeover Reform*, FIN. TIMES, Mar. 1, 2010, <http://www.ft.com/cms/s/0/5491ca8a-2587-11df-9bd3-00144fcab49a.html#ixzz1Y8uy6kxO>.

⁹ *See* Steven M. Davidoff, *British Takeover Rules May Mean Quicker Pace but Fewer Bids*, N.Y. TIMES, Sep. 19, 2011, <http://dealbook.nytimes.com/2011/09/19/new-british-rules-will-speed-up-the-pace-of-takeovers/>.

¹⁰ This comment will suggest, *infra* Part IV, that a measured, limited application of this proposed amendment may increase shareholder protection in the future.

¹¹ *Consultation Paper*, *supra* note 4, at 20.

¹² *Takeover Code*, *supra* note 3, Introduction, Gen. Principles 1-6, at B1; The Panel on Takeovers and Mergers, Explanatory Paper: *Implementation of the European Directive on Takeover Bids*, 2005/10, apps. 1-2 at 24-26.

¹³ *Takeover Code*, *supra* note 3, Introduction, Gen. Principles 1-6, at B1.

¹⁴ *See infra* Part I.A.

¹⁵ *See infra* Part I.B.

changes to the Takeover Code and will explore the concerns with, and the reasoning behind, each amendment by examining the consulting and explanatory papers about The Code amendments issued by the Takeover Panel.¹⁶ Part IV will first look to economic studies of shareholder value in takeovers¹⁷ and then explore the effects of “short-term” investors¹⁸ on takeover attempts.¹⁹ Finally, this comment will conclude that the new amendments will mitigate those “short-term” investor detrimental effects and actually protect shareholders as the Takeover Code had always intended.

I. HISTORY & BACKGROUND

A. The Kraft-Cadbury Deal, the Resulting Fervor, and Swift Action by the Takeover Panel

It took Kraft Foods four hard-fought months to reach a deal with the shareholders of Cadbury.²⁰ After a series of offers and rejections, and then over two months of Cadbury posting increasing financial projections and share prices, Kraft increased its bid to £11.9 billion (\$19.55 billion U.S.), which the Cadbury board accepted on January 19, 2010.²¹ The Cadbury shareholders accepted Kraft's tender offer²² on February 2, 2010, with over seventy percent of the

¹⁶ See *infra* Parts II.A-D.

¹⁷ See *infra* Part III.A.

¹⁸ Merger arbitrageurs, discussed *infra* Part III.B, are the most prevalent type of “short-term” investors in M&A practices and the type with which this comment will concern itself.

¹⁹ See *infra* Part III.B.

²⁰ See *TIMELINE*, *supra* note 1.

²¹ See Graeme Wearden, *Timeline: Cadbury's Fight Against Kraft*, THE GUARDIAN, Jan. 19, 2010, <http://www.guardian.co.uk/business/2010/jan/19/cadbury-kraft-takeover-timeline>. Kraft made a public indicative offer on September 7, 2009, for £10.2 billion (approximately \$16.3 billion U.S.), Kraft submitted its firm hostile bid directly to the Cadbury shareholders on November 9, 2009, on the same terms it originally proposed to the Cadbury board. This offer was quickly rejected by the shareholders. See *id.*

²² For an explanation of a tender offer see *Tender Offer*, U.S. SEC. & EXCH. COMM', <http://www.sec.gov/answers/tender.htm> (last visited Jan. 28, 2012) (“A tender offer is a broad solicitation by a company or a third party to purchase a substantial percentage of a company's . . . registered equity shares or units for a

shareholders tendering their shares.²³ During this four-month process, the composition of the Cadbury shareholders changed drastically.²⁴ By the time the shareholders tendered their shares, “short-term” investors such as hedge funds had increased their share in Cadbury from five percent to about thirty-one percent of the company.²⁵

Throughout the takeover battle unions and politicians in the United Kingdom voiced strong opposition to Kraft swallowing Cadbury.²⁶ United Kingdom Business Secretary Lord Peter Mandelson, for example, was against the takeover as early as September 25, 2009.²⁷ After the transaction was consummated, Mandelson urged substantial reform of the United Kingdom takeover regime.²⁸ Unions in the United Kingdom also argued against the Cadbury takeover due to the fear of large-scale job cuts.²⁹ Compounding the fears and flaring political tempers, the Royal Bank of Scotland, at the time an eighty-four percent taxpayer-owned bank, agreed to loan Kraft £630 million (approximately \$1.03 billion U.S.) to finance the takeover after the bank had been bailed out by the

limited period of time. The offer is at a fixed price, usually at a premium over the current market price, and is customarily contingent on shareholders tendering a fixed number of their shares or units”).

²³ David Jones & Brad Dorfman, *Cadbury Shareholders Approve Kraft Takeover*, REUTERS, Feb. 2, 2010, <http://www.reuters.com/article/2010/02/02/us-cadbury-kraft-idUSTRE61124D20100202>.

²⁴ See *Foreign Takeovers in Britain: Small Island for Sale*, ECONOMIST, May 25, 2010, <http://www.economist.com/node/15769586>.

²⁵ *Id.*

²⁶ See *infra* text accompanying notes 27-30.

²⁷ David Teather, *Mandelson Admits Foreign Ownership of Firms Disadvantages UK*, THE GUARDIAN, Sept. 25, 2009, <http://www.guardian.com.uk/business/2009/sep/25/mandelson-british-industry-unions>.

²⁸ See Eaglesham & Saigol, *supra* note 8.

²⁹ See *Debt-Heavy Kraft Could Put 30,000 Cadbury Jobs at Risk, Warns Unite*, UNITE THE UNION, Jan. 13, 2010, http://archive.unitetheunion.org/news_events/archived_news_releases/2010_archived_press_releases/debt-heavy_kraft_could_put_3-1.aspx.

government.³⁰ Surely the Takeover Panel was acutely aware of the mounting political pressure throughout the United Kingdom.

In contrast to the dragged out takeover battle that ensued between Kraft and Cadbury, it took less than a year and a half for The Code Committee of the Takeover Panel to consider, propose, and adopt amendments to the United Kingdom's Takeover Code.³¹ In fact, a mere five weeks after the Kraft and Cadbury deal was completed, The Code Committee announced its intention to solicit input from the United Kingdom business community to review specific aspects of the Takeover Code.³² The Committee cited the Kraft takeover of Cadbury and the public reaction to the deal as the impetus for its action.³³ After this consultation period expired,³⁴ The Code Committee reviewed responses from numerous respondents. The Committee then roughly outlined amendments it felt compelled to undertake in an October 21, 2010, report.³⁵ By March 2011, The Committee had proposed amendments to the Takeover Code,³⁶ which it adopted with little change in late July 2011.³⁷ These amendments took effect September 19, 2011.³⁸

³⁰ *Clegg Attacks Brown Over RBS Funding for Cadbury Bid*, BBC, Jan. 20, 2010, http://news.bbc.co.uk/2/hi/uk_news/politics/8470776.stm.

³¹ The Code Committee officially announced and adopted the amendments in July 2011, but it was another two months before the amendments came into effect on Sept. 19, 2011.

³² *Consultation Paper*, *supra* note 4, at 1.

³³ *Id.*

³⁴ The consultation period ran from June 1, 2010 to July 27, 2010.

³⁵ THE PANEL ON TAKEOVERS AND MERGERS CODE COMMITTEE, REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS, PCP 2010/2, 1–2, <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/2010-22.pdf> [hereinafter *Panel Report*].

³⁶ THE PANEL ON TAKEOVERS AND MERGERS CODE COMMITTEE, REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS: PROPOSED AMENDMENTS TO THE TAKEOVER CODE, PCP 2011/1, <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201101.pdf> [hereinafter *Proposed Amendments*].

³⁷ *See* THE CODE COMMITTEE OF THE PANEL ON TAKEOVERS AND MERGERS, 2011, AMENDMENTS FOLLOWING THE CODE COMMITTEE'S REVIEW OF THE REGULATION OF TAKEOVER BIDS, Instrument 2011/2, 1,

B. The Operation of the Takeover Code and the Takeover Panel

The Takeover Panel was originally created in 1968 to oversee takeover regulation in the United Kingdom.³⁹ The Takeover Panel is charged with issuing and administering the Takeover Code.⁴⁰ The United Kingdom Companies Act of 2006 codified and broadened the rule-making powers of the Takeover Panel.⁴¹ Interestingly, when The Code Committee first started soliciting input for the recent amendments to The Code, the introduction paragraph of the Takeover Code stated that its purpose was to ensure the fair treatment of shareholders generally.⁴² However, when The Code Committee published its Consultation Paper that began the initial solicitations of input, the introduction had changed. The Committee specifically wrote that The Code is designed principally to ensure that shareholders in an offeree⁴³ company . . . are treated fairly.”⁴⁴ As such, the Consultation Paper may have been the first indication that political pressures were forcing The Panel to consider strengthening target company shareholder protection.⁴⁵

The Takeover Panel and the Takeover Code are not concerned with the financial and commercial merits of takeovers.⁴⁶

<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/Instrument-2011-2.pdf> [hereinafter *Amendment Instrument*].

³⁸ *Id.*

³⁹ *Consultation Paper*, *supra* note 4, at 1-2. The Takeover Panel governs publically listed companies on the U.K. stock exchanges that have their registered offices in the U.K. See *Takeover Code*, *supra* note 3, *Introduction*, ¶ 3(a) at A3.

⁴⁰ *Takeover Code*, *supra* note 3, *Introduction*, ¶ 1 at A1.

⁴¹ Companies Act 2006, (c. 46), pt. 28 ch. 1.

⁴² See *Amendment Instrument*, *supra* note 37, at app. 1. (amending *Introduction* ¶ 2(a) from “The Code is designed principally to ensure that shareholders are treated fairly . . .” to “. . . to ensure that shareholders *in an offeree company* are treated fairly . . .”).

⁴³ The Takeover Panel uses the terms “Offeree” and “Offeror” to designate targets and acquirers. This comment will typically use the American designations of “target” and “acquirer” or “bidder,” but will also use the formal British terms of The Panel at times, especially when quoting or directly referring to the Takeover Code or papers from The Panel.

⁴⁴ *Consultation Paper*, *supra* note 4, at 2.

⁴⁵ See generally Davidoff, *supra* note 9.

⁴⁶ *Takeover Code*, *supra* note 3, *Introduction* ¶ 2(a) at A1; *Consultation Paper* at 2, 5.

The Panel has never taken a view on the advantages or disadvantages of takeovers to the companies participating in them.⁴⁷ Instead, The Panel and The Code exist to establish a framework to regulate the conduct of companies involved in a particular transaction.⁴⁸ The final decision on the merits of an offer, however, is left to the shareholders.⁴⁹

In light of these principles, a central pillar of the Takeover Code, and an excellent example of its purpose of ensuring fair treatment of shareholders, is the Board Neutrality Rule.⁵⁰ The Board Neutrality Rule prevents the board of directors of a target company from taking any action that may frustrate or deny the shareholders the opportunity to decide on the merits of an offer themselves.⁵¹ This is in stark contrast to the defensive tactics, such as poison pills,⁵² that Delaware courts have long endorsed.⁵³ As seen in the Cadbury takeover, the best defense a target board can legally employ is to ask the shareholders to vote against the bid.⁵⁴ Cadbury's board, for example, could only show improved financial data in an attempt to convince its shareholders that their long-term prospects of remaining shareholders of Cadbury were better than their short-term prospects (i.e. selling their shares to "short-term" investors or Kraft).⁵⁵ Alternatively, Cadbury's board could attempt to increase the fair

⁴⁷ *Consultation Paper*, *supra* note 4, at 5.

⁴⁸ *Takeover Code*, *supra* note 3, *Introduction* ¶ 2(a) at A1.

⁴⁹ *See Takeover Code*, *supra* note 3, *Introduction* ¶ 2(a) at A1-A2.

⁵⁰ *Takeover Code*, *supra* note 3, Rule 21.1(a) at I13 (applying during the course of an offer or when an offer is reasonably believed to be imminent).

⁵¹ *Id.*

⁵² SAMUEL S. THOMPSON, JR., BUSINESS PLANNING FOR MERGERS AND ACQUISITIONS: CORPORATE, SECURITIES, TAX, ANTITRUST, INTERNATIONAL, AND RELATED ASPECTS 155-56 (3d ed. 2008) ("The basic objectives of the [poison pill] are to deter abusive takeover tactics by making them unacceptably expensive to the raider [i.e. a hostile bidder] and to encourage prospective acquirers to negotiate with the board of directors of the target rather than to attempt a hostile takeover.").

⁵³ *See e.g.*, *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985).

⁵⁴ *See Wearden*, *supra* note 21.

⁵⁵ *See Id.*

value of Cadbury's shares—by making the company more profitable—beyond what Kraft would be willing to pay.⁵⁶

The Takeover Code presumes it is protecting shareholders from board entrenchment⁵⁷ by requiring neutrality of the board of directors of target companies.⁵⁸ Nevertheless, after receiving numerous responses to its Consultation Paper, The Code Committee concluded that hostile bidders had gained a tactical advantage over targets because of “short-term” investors.⁵⁹ The irony of dissuading board defensive maneuvers, only to have “short-term” investors provide the shareholder support that a bidder may need to complete their hostile takeover, seems to have been a tipping point for The Panel. In response, The Panel enacted several major amendments, discussed below, to help tilt the balance of power back to a more reasonable level for the target company shareholders.⁶⁰

II. THE 2011 AMENDMENTS TO THE TAKEOVER CODE

To restore the level of protection originally afforded to target company shareholders, The Code Committee sought to correct some perceived disadvantages to those shareholders that had developed in the system.⁶¹ The first problem that The Committee addressed was the problem of the “virtual bid.”⁶² The “virtual bid” is a term of art given to the time period after an announcement of a potential bid has been made, but before a firm offer is made.⁶³ This time period has many effects. Significantly, it can lead to a change in the composition of the shareholders when some shareholders sell to merger arbitrageurs⁶⁴ (i.e. “short-term” investors).⁶⁵ Other problems The

⁵⁶ *See Id.*

⁵⁷ For an explanation of board entrenchment see *infra* Part III.A.

⁵⁸ *See Takeover Code, supra* note 3, Note 5 on Rule 21.1 at I15.

⁵⁹ *Panel Report, supra* note 35, at 3; *see also supra* note 8.

⁶⁰ *See infra* Part I.

⁶¹ *See generally Consultation Paper, supra* note 4.

⁶² *Panel Report, supra* note 35, at 4.

⁶³ *See id.* (explaining that the offer period is the period after there is public knowledge of the potential bid. This can arise from an official announcement or if information is accidentally leaked).

⁶⁴ *Id.*

⁶⁵ *See supra* text accompanying notes 8, 24-25.

Code Committee identified include: the acquiring company effectively having the ability to negotiate directly with the target shareholders and bypass the board without ever having to make a firm offer;⁶⁶ the bidding company obtaining the protections of the Board Neutrality Rule against the target board simply by announcing their intent to make an offer;⁶⁷ a target's board of directors being reluctant to ask The Panel for a "Put Up or Shut Up"⁶⁸ deadline for the fear of appearing self-serving;⁶⁹ and, the inclusion of inducement fees (i.e. break fees⁷⁰) becoming standard practice in many recent deals possibly precluding competing offers.⁷¹ The Code Committee attempts to address all of these problems through the amendments, which will account for the following four major changes to the operation of the United Kingdom's Takeover Code.

A. The Announcing All Bidders Requirement

The 2011 Amendments to the Takeover Code will affect how bidding companies approach target companies.⁷² The new Announcing All Bidders requirement, operating in concert with the mandatory "Put Up or Shut Up" deadline,⁷³ will likely have the greatest impact on the approach. Rule 2.4(a) of the Takeover Code has been completely rewritten to require a target company to identify any potential bidder with which the target has been in negotiations⁷⁴ as soon as an offer period commences.⁷⁵ Furthermore, Rule 2.2 now

⁶⁶ *Panel Report*, *supra* note 35, at 4.

⁶⁷ *Id.*

⁶⁸ *See generally Put Up or Shut Up*, FIN. TIMES LEXICON, (Feb. 02, 2012, 3:09 PM) <http://lexicon.ft.com/Term?term=put-up-or-shut-up> ("The 'put up or shut up' Takeover Panel rule is designed to stop predators besieging companies for an indefinite period of time. It requires a potential bidder either to make an offer to shareholders or walk away for a period of six months").

⁶⁹ *Panel Report*, *supra* note 35, at 4-5.

⁷⁰ *See Break Fee* *infra* note 111.

⁷¹ *Panel Report*, *supra* note 35, at 5.

⁷² *See Client Briefing*, Clifford Chance, *supra* note 7, at 16.

⁷³ *Infra* Part II.B.

⁷⁴ *Takeover Code*, *supra* note 3, Rule 2.4(a) at D5; *Amendment Instrument*, *supra* note 37, at app. 8.

⁷⁵ *See Amendment Instrument*, *supra* note 37, at app. 8; *see also id.* at app. 3 ("An offer period will commence when the first announcement is made of an offer or possible offer for a company").

requires that the target company make an announcement in any of three situations: first, when the board of the target company receives notification of a firm intention to make an offer;⁷⁶ second, when following an approach from, or on behalf of, a bidding company the target company becomes the subject of rumors, speculation or if there is an untoward movement in the target company's share price;⁷⁷ or third, when a potential bidder has considered an offer but has not approached the board of the target company yet, and the target becomes the subject of rumor or speculation, or there is an untoward movement in the target company's share price and there are reasonable grounds to conclude that the bidder's potential actions have led to the situation.⁷⁸ In other words, when it is known or rumored that a potential bid may affect securities' prices, the target company is required to make a public announcement of all known potential bidders. This amendment will likely heighten the secrecy with which bidding companies will plan their approach because the mandatory "Put Up or Shut Up" deadline amendments, discussed below, will tie in with this mandatory identification of the All Potential Bidders Amendment.⁷⁹

B. The Mandatory Twenty-Eight Day "Put Up or Shut Up" Deadline

Amended rules to the Takeover Code 2.6, 2.7 and 2.8 together govern the function of the colloquially dubbed "Put Up or Shut Up" deadline.⁸⁰ Rule 2.6(a) expressly grants only a limited twenty-eight day window from when a potential bidder is first

⁷⁶ *Takeover Code*, *supra* note 3, Rule 2.2 at D2-D5; *Amendment Instrument*, *supra* note 37, at app. 5-6.

⁷⁷ *Takeover Code*, *supra* note 3, Rule 2.2 at D2-D5; *Amendment Instrument*, *supra* note 37, at app. 5-6.

⁷⁸ *Takeover Code*, *supra* note 3, Rule 2.2 at D2-D5; *Amendment Instrument*, *supra* note 37, at app. 5-6.

⁷⁹ See Client Briefing, Clifford Chance, *supra* note 7, at 16; Orrick, Herrington & Sutcliffe, *Private Equity Global Insights, Proposed Changes to the UK Takeover Code* (April, 2011) <http://www.orrick.com/Events-and-Publications/Documents/3569.htm>.

⁸⁰ See *Takeover Code*, *supra* note 3, Rule 2.6 at D9-D10; *Amendment Instrument*, *supra* note 37, at app. 12-14; *Takeover Code*, *supra* note 3, Rule 2.8 at D12-D14; *Amendment Instrument*, *supra* note 37, at app. 16-18.

publically identified and announced until that potential acquirer must: 1) announce a firm intention to make an offer in accordance with Rule 2.7;⁸¹ or 2) announce that it does not intend to make an offer. The latter situation then triggers Rule 2.8.⁸² Rule 2.8 bars, for six months, any company that has announced that it will not make an offer to a target from a number of activities, including: announcing an offer or possible offer for the same target;⁸³ acquiring any interest in shares of the previous target or any irrevocable commitment for those shares amounting to an aggregate of thirty-percent of the voting rights of the target company;⁸⁴ making any statement that may raise or confirm the possibility that the bidder may make an offer to the target company;⁸⁵ or take any steps in connection with a possible offer for the target.⁸⁶ In other words, Rule 2.6 starts the twenty-eight day countdown, at which point the potential bidder must comply with Rule 2.7 and make a firm offer (the “Put Up” part), or walk away for six months under Rule 2.8 (the “Shut Up” part).⁸⁷

Rule 2.6 and its automatic invocation of Rule 2.8 will put time constraints on bidders that were rarely seen before the amendments.⁸⁸ This change reflects The Panel’s attempt to remedy the aforementioned problems resulting from the “virtual bid.”⁸⁹ Now that the twenty-eight day deadline begins automatically upon an

⁸¹ *Takeover Code*, *supra* note 3, Rule 2.7(a) at D11-D12 (requiring an offeror company to follow through on its firm intention to make an offer unless another company makes a higher offer or some other limited exceptions occur).

⁸² *Takeover Code*, *supra* note 3, Rule 2.6(a) at D9.

⁸³ *Takeover Code*, *supra* note 3, Rule 2.8(a) at D12-13.

⁸⁴ *Takeover Code*, *supra* note 3, Rule 2.8(b)-(c) at D12-D13.

⁸⁵ *Takeover Code*, *supra* note 3, Rule 2.8(d) at D12-D13.

⁸⁶ *Takeover Code*, *supra* note 3, Rule 2.8(e) at D12-D13.

⁸⁷ *See Takeover Code*, *supra* note 3, Rules 2.6-2.8 at D9-D13.

⁸⁸ *See Put Up or Shut Up*, *supra* note 68 (explaining that before the amendments a 28 day Put Up or Shut Up deadline was imposed by The Panel only after the target board asked for, and was granted one by The Panel, when they were besieged without a firm offer having been made).

⁸⁹ THE PANEL ON TAKEOVERS AND MERGERS CODE COMMITTEE, REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS: RESPONSE STATEMENT BY THE CODE COMMITTEE OF THE PANEL FOLLOWING THE CONSULTATION ON PCP 2011/1, RS 2011/1 at 7, 12 <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201101.pdf> [hereinafter *Response Statement*].

announcement that starts an offer period, bidding companies will want to keep their investigations into, or preparations for, an offer secret for as long as possible.⁹⁰ Bidding companies will likely shroud their actions in secrecy to avoid having only twenty-eight days to “Put Up or Shut Up” when they are not advanced enough in their preparations to make an offer within that period.⁹¹

About two-thirds of respondents to the Consultation Paper were actually opposed to the coupling of the all bidders identification requirement and the mandatory “Put Up or Shut Up” deadline for various reasons.⁹² The primary reason is because the mandatory “Put Up or Shut Up” deadline may reduce competition for the acquisition of target companies and thus possibly deny target shareholders the benefit of other competing offers.⁹³ Also, it may cause more advanced potential bidders to “flush out” less advanced potential bidders by leaking information that will require an announcement and an identification of all potential bidders.⁹⁴ The amendments may otherwise create an “uneven playing field” where bidders that are more advanced in their preparations will have a large advantage over those not as advanced in their preparations.⁹⁵ The Panel decided to enact the amendments with little change despite having more opposition than support.⁹⁶

⁹⁰ This is now due to the requirement that all bidders be named in an announcement that opens an offer period from amended Rules 2.2 and 2.4(a).

⁹¹ See Client Briefing, Clifford Chance, *supra* note 7, at 11, 16; Orrick, Herrington & Sutcliffe, *supra* note 79.

⁹² *Response Statement*, *supra* note 89, at 8.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* (showing that although listed as separate concerns, those respondents who were opposed to the mandatory identification of all potential bidders requirement were generally concerned about the “uneven playing field” that could arise after an announcement that starts an offer period regardless of whether it begins in the natural course of offer negotiations or because a well-advanced bidding company is attempting to “flush out” the less well-advanced potential bidders).

⁹⁶ See *id.* at 9-11. Furthermore The Committee deemed that it would be inappropriate to allow the Offeree company’s board to decide when they wanted to keep a potential bidder’s identity secret because that would lead to potential bidders requiring, as a pre-condition, a confidentiality agreement to keep their identity concealed in almost every deal. *Id.*

The Panel decided that it would review how the amendments affected the M&A market one year after their implementation.⁹⁷ The one-year review was published in November of 2012.⁹⁸ Although the findings were generally positive, the report also stated that much of the effects of the amendments remain to be seen.⁹⁹ Multiple large law firms predicted, just after The Panel announced that the amendments would be adopted, that the identification of all potential bidders requirement, and the mandatory twenty-eight day “Put Up or Shut Up” deadline, would require bidders to use the utmost secrecy when preparing a bid.¹⁰⁰ Bidders would need to be much more advanced in their preparations before making an approach to a target company board of directors than a bidding company would be under the pre-amendments Code.¹⁰¹ The Committee kept the narrow exception that a target board could request an extension of the “Put Up or Shut Up” deadline for some or all potential bidders in a takeover.¹⁰² This exception will provide some relief for potential bidders negotiating a friendly acquisition with the target company’s board of directors.¹⁰³ Hostile bidders, on the other hand, will need to be wary of how they protect information regarding a potential approach to a target.¹⁰⁴ It is this heightened wariness that led some commentators to conclude that the amendments will deter potential bidders from ever making an offer in the first place and thereby harm

⁹⁷ *Response Statement*, *supra* note 89, at 5.

⁹⁸ Discussed *infra* Part III.

⁹⁹ See generally THE PANEL ON TAKEOVERS AND MERGERS CODE COMMITTEE, REVIEW OF THE 2011 AMENDMENTS TO THE TAKEOVER CODE, 2012/8, <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2012/01/2012-8.pdf> [hereinafter *One Year Review*].

¹⁰⁰ Iain Wright, Publications, *The UK Takeover Code: Significant Changes Come Into Effect*, MORGAN, LEWIS & BOCKIUS (Sept. 22, 2011), <https://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/1f22a35e-c340-4de3-9703-2954b8020a98>. See Client Briefing, Clifford Chance, *supra* note 7, at 16; Orrick, Herrington & Sutcliffe, *supra* note 79.

¹⁰¹ See Wright, *supra* note 100; Client Briefing, Clifford Chance, *supra* note 7, at 11, 16; Orrick, Herrington & Sutcliffe, *supra* note 79.

¹⁰² *Takeover Code*, *supra* note 3, Rule 2.6(c) at D9.

¹⁰³ Wright, *supra* note 100, at 3.

¹⁰⁴ See Wright, *supra* note 100, at 2.

target shareholders by suppressing bid competition.¹⁰⁵ The divisive response of commentators, both before and after The Panel adopted the amendments, shows that these two major amendments aimed at correcting the “virtual bid” period remain the most controversial of the amendments.¹⁰⁶

C. The Prohibition of Deal Protection Measures

The Panel’s sweeping decision to prohibit deal protection measures, except in limited circumstances,¹⁰⁷ puts the United Kingdom at odds with most other developed M&A markets.¹⁰⁸ As part of the amendments, The Code Committee entirely rewrote Rule 21.2.¹⁰⁹ New Rule 21.2(a) prohibits the target company, or any person acting in concert with the target company, from entering into any offer related arrangements with a bidder.¹¹⁰ Furthermore, Rule 21.2(b) makes it clear that this prohibition includes inducement fees¹¹¹ of any amount.¹¹² This is a significant change to U.K. M&A practice where inducement fees of one-percent had become standard

¹⁰⁵ See *Response Statement*, *supra* note 89, at 8; Patrone, *supra* note 5, at 77-78.

¹⁰⁶ See Wright, *supra* note 100, at 2.

¹⁰⁷ The exceptions where the amendments still allow inducement fees are: with a friendly or more preferred competing bid to a hostile bid (a “white knight”) up to one-percent of the first “white knight” offer only payable if the hostile competing bid is successful; if the target is in financial distress; or with a preferred bidder up to one-percent of the bid in the event that the target has commenced a formal auction sale. See Client Briefing, Clifford Chance, *supra* note 7, at 8, 12 (stating that most markets allow deal protection measures).

¹⁰⁸ *Id.* (stating that most markets allow deal protection measures).

¹⁰⁹ *Response Statement*, *supra* note 89, at 37.

¹¹⁰ *Takeover Code*, *supra* note 3, Rule 21.2(a) at I16; *Amendment Instrument*, *supra* note 37, at app. 32.

¹¹¹ See generally Megan Murphy, *Takeover Panel Set to Ban Break Fees*, FIN. TIMES, Mar. 21, 2011, at 18; *Break Fee*, THE FREE DICTIONARY <http://financial-dictionary.thefreedictionary.com/Break+Fee> (“In mergers and acquisitions, a fee the target pays to the acquirer in case a deal fails before completion. Theoretically, this is done to reimburse the acquirer for due diligence expenses, but, in practice, it is often used to attempt to restore good relations between the two companies”).

¹¹² *Takeover Code*, *supra* note 3, Rule 21.2(b) at I16; *Amendment Instrument*, *supra* note 37, at app. 32.

in almost all acquisitions.¹¹³ By comparison, the Delaware Chancery Courts have allowed inducement fees of three or three-and-a-half percent.¹¹⁴ Although commentators agree that this sweeping ban will alter what had become common practice, this modification was not contested as much as the “virtual bid” corrective amendments.¹¹⁵

The Panel’s Response Statement to their Consultation Paper notes that only around one-third of respondents were opposed to the amendments’ prohibition of inducement fees.¹¹⁶ Concerned respondents suggested that prohibiting inducement fees would deter potential bidders from making offers¹¹⁷ because the cost of preparing and negotiating an offer may be prohibitive without some assurance that the target will not leave a bidder at the altar.¹¹⁸ Similar to the major concern with the “virtual bid” corrective amendments, the major concern with the ban on inducement fees is that shareholders may be harmed by not having the chance to decide on the merits of *all* potential offers.¹¹⁹ In other words, some commentators are concerned that the inducement fee ban will deter potential bidders, reduce bid competition, and implicitly devalue the best offers that could have been made to a target company.¹²⁰

The Code Committee, however, concluded that this argument cuts both ways, and that inducement fees possibly deter competing bidders from making a topping offer.¹²¹ Competing bidders would be deterred because they would have to offer at an extra high premium

¹¹³ See Orrick, Herrington & Sutcliffe, *supra* note 79.

¹¹⁴ See e.g., *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000) (3.5% break fee are not unreasonable); *In re Pennaco Energy, Inc.*, 787 A.2d 691 (Del. Ch. 2001) (3% break fee and matching rights are not unreasonable).

¹¹⁵ See *Response Statement*, *supra* note 89, at 38 (“Around two-thirds of the respondents who commented on the proposed general prohibition of offer-related arrangements supported it or took a neutral stance”).

¹¹⁶ *Response Statement*, *supra* note 89, at 38.

¹¹⁷ *Id.*

¹¹⁸ See Orrick, Herrington & Sutcliffe, *supra* note 79 (stating that costs incurred in pre-offer activities such as due diligence and financing fees could be too much of a burden for some potential offerors if there is no compensation for those wasted costs if their bid is trumped).

¹¹⁹ *Response Statement*, *supra* note 89, at 38 (emphasis added).

¹²⁰ *Id.*

¹²¹ *Id.* at 39.

to make the deal worthwhile for the target company's shareholders to pay the inducement fee and accept the competing bid.¹²² With the support of a majority of respondents, The Code Committee implemented the amendment banning inducement fees because The Panel believed that inducement fees had become so standard in M&A transactions in the United Kingdom that targets were typically not afforded a chance to negotiate over these fees.¹²³ Consequently, law firms predict that the inducement fee ban will have the biggest impact on private equity firms, because private equity firms will typically be in a more constrained financial position and will not want to risk losing the money put into preparing a bid if their offer is trumped by a competing offer.¹²⁴ Strategic bidders¹²⁵ will also be concerned about the up-front costs of an offer after these amendments, but the effects of the ban on inducement fees will likely not be as drastic as with private equity firms.¹²⁶

D. The Enhanced Disclosure Requirements

The final major change to the Takeover Code, the imposition of enhanced disclosure requirements, consists of a series of small changes aimed at increasing transparency during an acquisition.¹²⁷ The most important new disclosures required by the Takeover Code amendments are the revelation of advisor's fees,¹²⁸ bid financing¹²⁹ and company financial information,¹³⁰ and of the bidding company's intention with regard to the target company and the target company

¹²² *Id.*

¹²³ See Wright, *supra* note 100, at 4.

¹²⁴ See Orrick, Herrington & Sutcliffe, *supra* note 79.

¹²⁵ A Strategic Bidder is a company that is attempting to takeover another company for the strategic purpose of enhancing its own value. For example, Kraft taking over Cadbury to improve its market share in the confections market.

¹²⁶ See Orrick, Herrington & Sutcliffe, *supra* note 79.

¹²⁷ See generally *Takeover Code*, *supra* note 3, Rules 23.2, 23.3, & 24 at J1-J16.

¹²⁸ *Takeover Code*, *supra* note 3, Rule 24.16 at J15-J16; *Amendment Instrument*, *supra* note 37, at 45-46.

¹²⁹ *Takeover Code*, *supra* note 3, Rule 24.3(f) at J7; *Amendment Instrument*, *supra* note 37, at 41.

¹³⁰ *Takeover Code*, *supra* note 3, Rule 24.3(a), (c) at J4, J5; *Amendment Instrument*, *supra* note 37, at 37-39.

employees.¹³¹ This section will briefly look at each of these major disclosure requirements.

1. *Disclosure of Advisor's Fees*

The idea behind disclosing advisory fees is that although the fees may only make up a small percentage of the total transaction, an advisory fee is still usually a significant amount of money, sometimes rising as high as nine digits.¹³² With advisory fees being such a significant amount of money, The Panel concluded that these fee arrangements are material contracts to an offer.¹³³ As such, the shareholders deserve to know how the directors are spending company money in relation to that offer, and disclosure of those fees might reveal incentives for advisors attempting to persuade their clients to a particular course of action.¹³⁴

2. *Disclosure of Financial Information and Financing Information*

Before the amendments were implemented, disclosure of financial information and information relating to the financing of an offer was only required in securities exchange offers.¹³⁵ The amendments now require disclosure of this information in all offers, including cash-out mergers.¹³⁶ A vast majority of respondents supported this disclosure requirement, even though there would be some small additional cost to bidders and targets in assembling this information for dissemination, because it benefits shareholders far beyond that added cost.¹³⁷

¹³¹ *Takeover Code*, *supra* note 3, Rule 24.2 at J3; *Amendment Instrument*, *supra* note 37, at 37.

¹³² Liam Vaughan, *M&A: Costs Overlooked in the Heat of the Moment*, FIN. NEWS, Jan. 3, 2011, <http://www.efinancialnews.com/story/2011-01-03/m-and-a-costs> (explaining that investment banks can earn about one to one and one half percent on deals over \$1 Billion, commercial banks can earn considerably more for financing an M&A deal, and legal fees can be as high as \$10 Million).

¹³³ *Proposed Amendments*, *supra* note 37, at 58.

¹³⁴ *Id.*

¹³⁵ *Response Statement*, *supra* note 89, at 67.

¹³⁶ *Takeover Code*, *supra* note 3, Rule 24.3(a)-(e) at J4-J7; *Amendment Instrument*, *supra* note 37, at 37-40.

¹³⁷ *Response Statement*, *supra* note 89, at 68.

3. *Disclosure of Future Intentions*

The major new disclosure requirement that appears to be the most reactionary to the Kraft-Cadbury takeover is the requirement to disclose intentions¹³⁸ regarding the target company and its employees.¹³⁹ Many British citizens were upset that Kraft announced that it would close Cadbury's Bristol factory, signaling the loss of 400 jobs, shortly after it promised to keep it open and spare all Cadbury jobs in the United Kingdom.¹⁴⁰ The amended Rule 24.2 requires that successful bidding companies make known, among other things, their intentions with regards to future employment of personnel and management, and their strategic plans for the acquired company.¹⁴¹ If the successful bidder has no intention to make any changes, the companies must disclose that as well.¹⁴² The respondents to the Consultation Paper agreed wholeheartedly with this change.¹⁴³ The Code Committee conceded, though, that some hostile bidders might not have undertaken enough due diligence to really know the exact future plans of the company.¹⁴⁴ In such cases, The Committee still expects that the bidding company should disclose, to the full extent possible, its business rationale for acquiring the target.¹⁴⁵

The 2011 amendments to the United Kingdom's City Code on Mergers and Takeovers will certainly have an impact on the M&A market and on M&A practice.¹⁴⁶ The question now becomes whether these amendments effectively protect target company

¹³⁸ For example, The Code Committee now wants an acquiring company to state if after the merger or takeover it will make any job cuts or close any offices or factories. See Sarah Gadd, *The Revised UK Takeover Code: Employment Considerations*, 13 THE WORKING WORLD (Lantham & Watkins), Nov. 2011, <http://www.lw.com/thoughtLeadership/working-world-november-2011>.

¹³⁹ See *id.*

¹⁴⁰ See e.g., *Cadbury's Bristol Plant to Close by 2011*, BBC NEWS, Feb. 9, 2010, <http://news.bbc.co.uk/2/hi/8507066.stm>.

¹⁴¹ *Takeover Code*, *supra* note 3, Rule 24.2 at J3; *Amendment Instrument*, *supra* note 37, at 36-37.

¹⁴² *Takeover Code*, *supra* note 3, Rule 24.2 at J3; *Amendment Instrument*, *supra* note 37, at 36-37. (*Id.*)

¹⁴³ *Response Statement*, *supra* note 89, at 80.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Davidoff, *supra* note 9.

shareholders from the recent perceived tactical advantage achieved by bidding companies? And furthermore, do the amendments reach too far or might they not reach far enough?

III. IMPLICATIONS OF THE 2011 TAKEOVER AMENDMENTS

As the collective owners of a corporation shareholders stand to gain or lose on their investment as the result of a merger or acquisition.¹⁴⁷ In public corporations, a large majority of shareholders individually have only a miniscule vote and cannot affect the policies of the corporation by voting their shares without the cooperation of many other shareholders.¹⁴⁸ In Delaware a corporate board of directors is able to utilize a poison pill to block their shareholders from selling their shares in a tender offer.¹⁴⁹ The United Kingdom, however, has developed a vastly different approach than the Delaware courts to protect shareholder interests in these potential multi-billion pound (or dollar) transactions.¹⁵⁰ The United Kingdom takeover regulations have always upheld board neutrality in a takeover situation, and The Code Committee did not compromise that tenet with the 2011 amendments.¹⁵¹ However, some have argued that abandoning the Board Neutrality Rule for more Delaware-like defensive maneuvers would have better protected shareholders.¹⁵²

¹⁴⁷ See generally 18 AM. JUR. 2D *Corporations* § 630 (2011).

¹⁴⁸ For example, as of the end of September 2011, ExxonMobil's largest shareholder was an institutional investor, The Vanguard Group, Inc. with 4.16% of the vote, contrasting with their largest direct shareholder Rex Tillerson, who has about 0.03% of the total vote. *Exxon Mobil Corporation (XOM): Major Holders*, YAHOO! FIN. (Jan. 5, 2011 3:55 PM) <http://finance.yahoo.com/q/mh?s=xom+Major+Holders>.

¹⁴⁹ A poison pill, or shareholder's rights plan, makes the shares so unattractive to the potential acquirer that an offer will never actually be made to shareholders, even if they desire the offer, without the board of directors first redeeming the poison pill. See e.g., *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1348-49 (Del. 1985).

¹⁵⁰ See e.g., Han-Wei Liu, *The Non-Frustration Rule of The U.K. City Code on Takeovers and Mergers and Related Agency Problems: What are the Implications for the E.C. Takeover Directive?*, 17 COLUM. J. EUR. L. ONLINE 5, 8-9 (2011), http://www.cjel.net/online/17_2-liu/ (illustrating briefly the difference in possible board of director action under U.S. and U.K. takeover regulation regimes).

¹⁵¹ See *Takeover Code*, *supra* note 3, Rule 21.1(a) at I13.

¹⁵² See Patrone, *supra* note 5, at 85.

This dichotomy between United Kingdom and United States takeover regulation begs the question: do these takeover regulation regimes protect shareholders equally and adequately? This part will look at economic studies of defensive devices and how they affect shareholder value, and will also explore how “short-term” investors affect established long-term shareholders.

A. Economic Studies of the Impact of Defensive Maneuvers

Studying the economic effect of defensive maneuvers on shareholders in takeover situations requires using data with numerous variables.¹⁵³ Different studies, focusing on different variables, have thus led to opposing conclusions.¹⁵⁴ The reality of the depth and breadth of data and variables results in no one study that definitively declares that shareholders benefit or suffer a loss when defensive measures are utilized by a target company’s board of directors.¹⁵⁵ Yet prominent Harvard M&A economist Lucian Bebchuk and some of his understudies have exposed a trend that the entrenchment of a board of directors¹⁵⁶ negatively affects shareholder value.¹⁵⁷ This is particularly relevant to the 2011 United Kingdom Takeover Code amendments because The Code Committee never questioned the importance of the Board Neutrality Rule,¹⁵⁸ which should continue to prevent the possibility of board entrenchment.

¹⁵³ See Michael D. Frakes, *Classified Boards and Firm Value*, 32 DEL. J. CORP. L. 113, 115 (2007).

¹⁵⁴ John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 97 GEO. L. J. 1727, 1732 (2007).

¹⁵⁵ See Frakes, *supra* note 153, at 114-15.

¹⁵⁶ Board entrenchment refers to the phenomenon of a corporation’s board of directors taking possibly self-serving action to maintain their positions as directors of the company. In the United States, when a board appears to be entrenching itself against shareholders’ wishes, a breach of fiduciary duty question will likely arise. See generally *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

¹⁵⁷ See generally Frakes, *supra* note 153, at 114-15; Lucian A. Bebchuk, et al., *The Powerful Anti-Takeover Force of Staggered Boards*, 54 STAN. L. REV. 887 (2002).

¹⁵⁸ See generally *Consultation Paper*, *supra* note 4 (declaring The Committee’s intention to make changes to The Code but never entertaining an amendment to the Board Neutrality Rule). But see Patrone, *supra* note 5 (arguing that repealing the

The Board Neutrality Rule in the United Kingdom prevents much data about board entrenchment in the United Kingdom's companies from being accumulated.¹⁵⁹ However, exploring the effects of board entrenchment in United States companies resonates with The Code Committee's support of the Board Neutrality Rule because the negative correlation of board entrenchment to shareholder value supports The Committee's decision to continually maintain board neutrality.¹⁶⁰ In 2002, Professor Bebchuk and colleagues conducted an in-depth study of Delaware companies with both poison pills and staggered boards¹⁶¹ that showed that the combination of these defensive measures makes it almost impossible for a bidding company to acquire a target company without consent from the board of the target company.¹⁶²

The empirical evidence from Professor Bebchuk's study suggests that staggered boards, combined with a poison pill, provide the most robust takeover defense in Delaware corporate law.¹⁶³ Furthermore, the research and statistical analysis shows that this robust takeover defense¹⁶⁴ does, in fact, lead to board

Board Neutrality Rule would better protect target shareholders instead of protecting target companies).

¹⁵⁹ See Nicholas F. Carline & Pradeep K. Yadav, *Decoupling the Motives for Takeover Resistance, and the Implications for Stockholders, Managers and Bidders* 3-4 (August 2008) (unpublished manuscript) (on file with The University of Oklahoma), http://www.ou.edu/content/dam/price/Finance/CFS/paper/pdf/SeminarPaper_Carline.pdf.

¹⁶⁰ See Bebchuk, *supra* note 157, at 937.

¹⁶¹ A staggered board of directors is a board that is split up into classes, and only one class is up for election at each annual shareholders meeting. For example, a company with a nine-director staggered board, in three classes, would have only three directors up for election every year, with the winners of that election serving three-year terms before they would be up for another election. The staggered board thus prevents a change in control of a company's shares from changing control of the board of directors until at least two annual shareholder meetings have passed, or in other words, at a minimum when just over one year has elapsed. See *Staggered Board*, INVESTOPEDIA (Jan. 5, 2011, 12:35 PM), <http://www.investopedia.com/terms/s/staggered-board.asp#axzz1iYTZNda8>.

¹⁶² See Bebchuk, *supra* note 157, at 890.

¹⁶³ *Id.* at 950.

¹⁶⁴ In Delaware Corporate law the board of directors can unilaterally impose a poison pill if they can meet the *Unocal* enhanced business judgment test *ex post* in the Delaware courts. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d

entrenchment.¹⁶⁵ It also shows that board entrenchment negatively affects shareholder value by an average of about 11.6% on their final return on investment.¹⁶⁶ This loss of wealth to the shareholders is most likely due to the high odds that the target company will remain independent.¹⁶⁷ Shareholders will often be unable to dismantle a staggered board or force the board to redeem a poison pill.¹⁶⁸ The shareholders are financially harmed by the resulting board entrenchment and their inability to cash in on an acquisition premium offered by the acquiring company for their shares.¹⁶⁹ This is the exact type of effect that the Takeover Panel sought to avoid in the United Kingdom with the Board Neutrality Rule.

Michael D. Frakes, a disciple of Bebchuk's, further explored how staggered boards affect firm value using three different statistical analyses designed to correct for estimated co-variables.¹⁷⁰ He also found a negative correlation between staggered boards and

946, 955 (Del. 1985); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985).

¹⁶⁵ Bebchuk, *supra* note 157, at 913-14, 937 (providing an example of U.S. Surgical's hostile bid for Circon in 1996, where Circon was able to thwart U.S. Surgical's hostile takeover attempt with a poison pill and an effective staggered board, only to end up selling itself two years later for 17% less than the original bid).

¹⁶⁶ *Id.* ("As a starting point we examine total shareholder returns, irrespective of bid outcome, for [Effective Staggered Board (ESB)] and non-ESB targets. Shareholders in the ESB targets in our sample achieved 31.8% returns in the nine months after a hostile bid was announced, compared to 43.4% returns for the shareholders in non-ESB targets, representing an 11.6% difference.").

¹⁶⁷ *Id.* at 950 ("We find that the increased odds of remaining independent are quite costly for target shareholders, without providing sufficient countervailing benefits in terms of higher acquisition premium. We estimate that an ESB reduces the expected return of target shareholders in the nine months after a hostile bid is launched on the order of 8-10%. The negative wealth effect associated with ESBs is particularly problematic from a policy perspective because the majority of staggered boards were established before the judicial developments that gave them their antitakeover potency.").

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See generally Frakes, *supra* note 153 (Frakes creates in-depth statistical models and regression analyses to correct for variables and co-variables such as other anti-takeover measures, firm size, firm value among others).

shareholder value.¹⁷¹ The Frakes and Bebchuk studies suggest that there could be added costs to target shareholders from how board entrenchment may affect manager and director behavior, though the studies specifically did not explore this aspect of staggered boards.¹⁷² This suggestion, although still not conclusively proven, provides a supplemental argument to the aforementioned return on investment concerns when a board of directors is allowed to unilaterally enact entrenching defensive measures.

As previously stated, these studies are not conclusive and there are arguments that defensive measures actually increase shareholder value.¹⁷³ However, the argument that defensive measures provide the board of directors a negotiating advantage to achieve higher premiums for the shareholders in a hostile or friendly takeover¹⁷⁴ has largely been undermined by Harvard Professor of Law and Business Guhan Subramanian.¹⁷⁵ His research suggests that the bargaining power hypothesis is only applicable in a narrow subset of acquisitions.¹⁷⁶ Professor Subramanian argues that takeover

¹⁷¹ See *Id.* at 150-51 (meaning that the more robust the defensive mechanism employed by the board of director, the lower shareholder value would tend to be).

¹⁷² See Frakes, *supra* note 153, at 114, 150; Bebchuk, *supra* note 157, at 939 (suggesting that when managers and directors are protected by defensive measures, they may not act as efficiently as possible, or in the best interest of the shareholders, because the directors know they cannot be ousted by discontent shareholders).

¹⁷³ See Frakes, *supra* note 153 (citing Lucian A. Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U CHI. L. REV. 973, 1011 (2002) (explaining that some of the major arguments in favor of defensive measures by the board of directors are: defensive measures allow management to avoid distractions and focus on current operations; without defensive measures directors may focus excessively on short-term results to the detriment of long-term value; and most importantly, that defensive measures give management a bargaining power that allows them to maximize the premium paid to shareholders in a hostile takeover)).

¹⁷⁴ See generally Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L. J. 621, 629-30 (2003).

¹⁷⁵ See Subramanian, *supra* note 174, at 623.

¹⁷⁶ . *Id.* ("I demonstrate that the bargaining power hypothesis only applies unambiguously to negotiations in which there is a bilateral monopoly between buyer and seller, no incremental costs to making a hostile bid, symmetric information, and loyal sell-side agents. These conditions suggest that the bargaining power hypothesis is only true in a subset of all deals, contrary to the

defenses do not help a target company's shareholders nearly to the extent argued by the "bargaining power" proponents of defensive measures, even in friendly, negotiated acquisitions.¹⁷⁷

Although not dispositive, the above-mentioned legal economists provide strong evidence that supports promoting the neutrality of a target board of directors in a hostile takeover situation. There remains, however, the problem The Code Committee faced on how to address "short-term" investors in a takeover, while still requiring the target board of directors to remain neutral.

B. Studies of the Effects of "Short-term" Investors

Modern financial market practices can lead to a distortion of shareholder voting rights by decoupling those voting rights from an economic interest in the company.¹⁷⁸ This often happens through the buying and selling of call options or put options on shares borrowed from brokers, or using other forms of derivatives.¹⁷⁹ In mergers and acquisitions, voting disparity will arise in merger arbitrage,¹⁸⁰ or

claim of some defense proponents that the hypothesis applies to all negotiated acquisitions.").

¹⁷⁷ *Id.* at 684.

¹⁷⁸ See *TR Investors, LLC v. Genger*, 2010 Del. Ch. LEXIS 153, 70-71 (Del. Ch. July 23, 2010) (explaining how the voting rights and residual claims of shares can be separated and thereby result in situations where a stock holder might vote adversely to the interests of the company because their economic interests do not align with shareholders who have a long-term, residual claim vested in their shares) (citing Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775).

¹⁷⁹ For discussions on the intricacies of methods of decoupling share voting rights from share economic interests see Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775. See also Henry T. C. Hu and Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006).

¹⁸⁰ Merger arbitrage is when an investor buys shares of the target company after the announcement of a merger or tender offer. The investor hopes to profit on the premium paid by the acquirer to the target shareholders over the market price that the investor bought the shares after the announcement. The major risk for this type of investment is if the companies fail to consummate the transaction, the shares will likely be worth less than what the investor paid to acquire them. See *Merger Arbitrage*, FUNDAMENTALFINANCE (Jan. 16, 2012, 5:49 PM),

alternatively, when a shareholder has a negative economic interest¹⁸¹ arising when the investor short sells her shares.¹⁸²

In the modern M&A marketplace, the most influential short-term investors are typically hedge or mutual funds.¹⁸³ Institutional investors like mutual funds are, in practice, the only investors with the resources to attain voting rights sufficient to affect the outcome of a shareholder vote.¹⁸⁴ There are recent examples of hedge funds being able to use their voting power to block or alter acquisitions from both the acquiring side and the target side.¹⁸⁵ This institutional investor activism is not always detrimental to the established individual shareholders of these companies.¹⁸⁶ However, the possible decoupling of the economic interests from the voting rights in a merger arbitrage situation poses serious complications with respect to the established shareholders.¹⁸⁷ This section will attempt to

<http://www.fundamentalfinance.com/mergers-acquisitions/merger-arbitrage.php>.

¹⁸¹ An investor might have a negative economic interest in a company when he or she makes a profit if the share price declines. See Hu & Black, *supra* note 179, at 832-34.

¹⁸² Short selling is when an investor borrows shares from their broker, and sells those shares immediately. The investor is then required to “cover” those borrowed shares by buying identical securities and giving them back to the broker. The investor is attempting to profit by betting that the share price will fall between when they sell the borrowed shares and when they have to “cover” those shares. A price drop will give the investor a profit of the difference in price of the initially sold shares and the bought back “covering” shares. If the price rises within that time frame, however, the investor will realize a loss equal to that same difference. See Brigitte Yuille, *Short Selling: What is Short Selling?*, INVESTOPEDIA (Jan. 16, 2012, 6:14 PM), <http://www.investopedia.com/university/shortselling/shortselling1.asp#axzz1jf8S8DOx>.

¹⁸³ See Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1442 (2008).

¹⁸⁴ See *supra* note 148.

¹⁸⁵ See Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1034-36 (2007) (explaining, how Deutsche Borse was forced to abandon its bid for the London Stock Exchange because of its own dissatisfied hedge fund and mutual fund shareholders).

¹⁸⁶ *Id.* (explaining how Chiron institutional shareholders expressed dissatisfaction with Novartis’ bid for Chiron and eventually forced Novartis’ premium paid up from 23% to 32%).

¹⁸⁷ See *infra* Part III.B.1-2.

summarize the major concerns regarding the disconnect between voting rights and economic interests that have arisen over the last two decades and how those concerns pertain to mergers and tender offers. The following sections will discuss a typical merger arbitrage situation, and the decoupling of votes and economic interests.

1. *Merger Arbitrage Situations*

It does not take a large inferential leap to realize that there can be situations where merger arbitrageurs may be able to obtain the votes to approve the sale of a target company, or to tender enough target company shares, to force a transaction that may not maximize value for established individual shareholders.¹⁸⁸ A working paper by Georgetown finance professor Lee Pinkowitz used statistical analysis to highlight that companies with a large aggregate institutional shareholder block are more likely to be targets of takeovers, and that those takeovers are more likely to be successful.¹⁸⁹ Pinkowitz's analysis revealed that institutional investors are important to the takeover process because they either quickly tender their shares to the bidder, or quickly sell their shares on the open market to merger arbitrageurs.¹⁹⁰ The study posits that the potential of these quick sales make the target stock more liquid, and thus more likely to make the acquisition successful.¹⁹¹

Likewise, Chancellor Chandler of the Delaware Chancery Court recently noted in the *Air Products* case that the threat of merger arbitrageurs tendering into an inadequate offer could be a legitimate threat under the first prong of a *Unocal* test,¹⁹² "if the offer is indeed

¹⁸⁸ For a prime example see *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 109 (Del. Ch. 2011) (explaining that merger arbitrageurs tendering into an inadequate offer may be a reasonable threat to a corporation).

¹⁸⁹ Lee F. Pinkowitz, *Monitoring by Transient Investors? Institutions and Corporate Control* 21, 24 (unpublished manuscript) (on file at with Georgetown University, McDonough School of Business), <http://faculty.msb.edu/lfp/Inst101800.pdf>.

¹⁹⁰ *Id.* at 24.

¹⁹¹ *Id.* at 28.

¹⁹² See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A. 2d 946, 955 (Del. 1985) (stating that for board defensive measures to fall under the protection of the business judgment rule that the board must: 1) demonstrate that they had reasonable grounds for believing that a danger to corporate policy and effectiveness

inadequate.”¹⁹³ In this case, by the time the suit was filed, almost half of the target company shareholders were merger arbitrageurs,¹⁹⁴ which may demonstrate the prevalence and potential impact of arbitrageurs on takeovers. While *Air Products* concedes that merger arbitrageurs help complete acquisitive transactions, Chancellor Chandler strongly derides the possible adverse impact of merger arbitrageurs on target company shareholders in a takeover.¹⁹⁵ As Chancellor Chandler explained in one case:

[T]he bad [arbitrageurs] and hedge funds who bought in, had obviously bought their shares from folks who were glad to take the profits that came with market prices generated by the Merger and Vector Capital’s hint of a higher price. These folks, one can surmise, had satisfied whatever long-term objective they had for their investment in Inter-Tel.¹⁹⁶

Merger arbitrageurs clearly have an impact on M&A transactions in general, but there remains skepticism as to how much arbitrageurs negatively affect shareholders of the target company. Individual established shareholders still must choose to sell their shares to the “short-term” investors in the first place, thereby satisfying their own investing goals.

existed and 2) that their defensive measure in response was reasonable in comparison to the threat posed).

¹⁹³ *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A. 3d 48, 109 (Del. Ch. 2011) (explaining, however, that in this case there was no legitimate threat because the offer was, in fact, adequate).

¹⁹⁴ *Id.* (“The argument is premised on the fact that a large percentage (almost half) of Airgas’s stockholders are merger arbitrageurs—many of whom bought into the stock when Air Products first announced its interest in acquiring Airgas, at a time when the stock was trading much lower than it is today—who would be willing to tender into an inadequate offer because they stand to make a significant return on their investment even if the offer grossly undervalues Airgas in a sale.” In short, the risk is that a majority of Airgas’s stockholders will tender into Air Products’ offer despite its inadequate price tag, leaving the minority “coerced” into taking \$70 as well).

¹⁹⁵ *Id.* (“The defendants do not appear to have come to grips with the fact that the arbs bought their shares from long-term stockholders who viewed the increased market price generated by Air Products’ offer as a good time to sell”).

¹⁹⁶ *Id.* at 109 n. 413 (citing *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 815 (Del. Ch. 2007)).

2. Problems with Decoupling Voting Rights and Economic Interests

Further compounding this institutional investor complex is how derivatives¹⁹⁷ can decouple the economic interest from the voting rights of shares. Two examples can help to illustrate this principle. First, imagine a proposed acquisition where a target company institutional shareholder is strongly interested in consummating a proposed stock for stock merger, only the investment community and influential acquiring company shareholders think it is a bad deal and begin to convince the acquiring company to back away. The institutional shareholder then buys almost 9.9% of the acquiring company stock, but immediately short sells¹⁹⁸ another 9.9%. This transaction gives the institutional shareholder the 9.9% vote from the first stock purchase, but completely removes any economic risk from that purchase because the short sale will totally offset any gain or loss from the voting stock. Therefore, the institutional shareholder has a block of shares to vote for the transaction against the wishes of most of the acquiring company shareholders, at no economic risk, and then benefits greatly from its target company stock after it is sold at an acquisition premium, to the acquiring company.¹⁹⁹

A second example occurred in Hong Kong in early 2006 where a deal, of which most minority target shareholders approved, was blocked by a hedge fund.²⁰⁰ The fund had borrowed target

¹⁹⁷ Examples include, futures contracts, forward contracts, options and swaps. See *Derivative*, INVESTOPEDIA (Jan. 18, 2011, 1:35 PM), <http://www.investopedia.com/terms/d/derivative.asp#axzz1jqBsyPgK>.

¹⁹⁸ See *supra* note 182

¹⁹⁹ This entire example is heavily based on the Mylan Laboratories offer for King Pharmaceuticals, where Perry Hedge Fund acted much like the example institutional investor. For an excellent review of this situation see Anish Monga, Note, *Using Derivatives to Manipulate the Market for Corporate Control*, 12 STAN. J. L. BUS. & FIN. 186, 196-97 (2006).

²⁰⁰ See Hu & Black, *supra* note 179, at 834-35 (“Henderson Land offered to buy the 25% minority interest in Henderson Investment, a publicly held affiliate. Most minority shareholders favored the buyout, and Henderson Investment’s share price increased substantially. Under Hong Kong law, however, the buyout could be blocked by a negative vote of 10% of the “free floating” shares—in this case about 2.5% of the outstanding shares. To everybody’s surprise, 2.7% of the shares were voted against the buyout. Henderson Investments shares fell 17% the day after the

company shares, and short sold them to make a profit off of the collapsed deal when the target share price declined sharply after the deal fell through.²⁰¹ Other economic and voting decoupling complications can arise in various contexts, including other merger and acquisition situations.²⁰² While many of the risks and pitfalls that are pervasive throughout merger arbitrage stand out and beg to be addressed by different takeover regimes, it remains unclear if target company shareholders suffer due to these merger arbitrageurs. To summarize, the Board Neutrality Rule appears to well protect shareholders, while it remains far from conclusive that “short-term” investors do, or do not have a negative impact on shareholders.

IV. WHY THE TAKEOVER CODE AMENDMENTS WILL WORK

The Code Committee may have gotten the 2011 Takeover Code amendments just right. The staggering number of variables in any regulation means that only time will tell if The Committee did, in fact, hit a bull’s eye with these amendments, or if corrective changes will be necessary sooner rather than later. This section will hypothesize that the amendments will accomplish the goal of leveling the playing field between targets and acquirers, all while continuing to robustly protect shareholders, and not overreaching to the detriment of other members of the M&A marketplace.

The Code Committee and the Takeover Panel set out to fix the perceived imbalance of power in favor of acquiring companies over target companies, and more importantly, the perceived adverse effect of “short-term” investors.²⁰³ The amendments should help to rectify this imbalance in a number of ways. First, the mandatory “Put

voting outcome was announced. It appears that . . . hedge funds borrowed Henderson Investment shares before the record date, voted against the buyout, and then sold those shares short, thus profiting from its private knowledge that the buyout would be defeated”).

²⁰¹ *Id.*

²⁰² See generally Martin & Partnoy, *supra* note 179, at 788-92.

²⁰³ See *supra* Part I.

Up or Shut Up” deadline should combat the “virtual bid” issues with hostile takeovers in the United Kingdom.²⁰⁴

The mandatory “Put Up or Shut Up” deadline gives only a limited window of four weeks for a potential bidder to make a firm offer or walk away for six months.²⁰⁵ The amount of pressure to blindly sell the target company applied to a company by merger arbitrageurs should be partially alleviated by the limited window imposed by this deadline.²⁰⁶ If a company can no longer besiege a target,²⁰⁷ then this will decrease the likelihood that the composition of the shareholders will have changed significantly through arbitrageurs buying from established shareholders at small price increases.²⁰⁸ Smaller voting blocks of merger arbitrageurs means that there would likely be more established target shareholders available to vote on the merits of the offer as they see fit. Unlike in *Air Products*, where by the time the suit was filed almost half of the shareholders were arbitrageurs, the limited window and the Announcing All Bidders requirement should prevent large scale arbitrage from taking place in the takeover of United Kingdom public companies and should protect the established shareholders of the target companies in the original spirit of The Code.²⁰⁹ Although The Code forbids coercive offers,²¹⁰ the besieging of a target company was in a way coercive by allowing arbitrageurs to erode target shareholder support. The “Put Up or Shut Up” deadline should make great strides in rectifying the erosion that results from the uncertainty of a protracted “virtual bid” period; and the added secrecy and cost that may be placed on

²⁰⁴ See *supra* text accompanying notes 61-62.

²⁰⁵ See *supra* Part I.A-B.

²⁰⁶ These merger arbitrageurs will have likely bought target stock on the open market after a slight increase in price due to the looming potential offer. From that stock they would use their voting power to attempt to consummate the transaction, and realize a gain on the acquisition premium paid by the acquirer.

²⁰⁷ Under the pre-amendment rules a company could besiege a target by announcing that it is thinking about making a bid, while never actually making a bid for months on end.

²⁰⁸ See *supra* note 195; see also *supra* text accompanying note 25.

²⁰⁹ See *supra* note 12.

²¹⁰ See *Takeover Code*, *supra* note 3, Rule 9.1 at F1-F13 (requiring a bid to all target shareholders if a bid is made for over 30% control, and requiring a best offer, that the best offer made to any shareholder is made to all shareholders).

acquiring companies is worth the benefits to the target shareholders.²¹¹

The deal protection ban will likely have a small impact in protecting shareholders, but to what extent remains to be seen. The possibility exists that the inducement fee ban will actually decrease the amount of acquiring companies that want to make an offer because they will fear spending money on the preparation only to lose out to a topping bidder.²¹² That may help the target company,²¹³ but it may hurt the target company shareholders.²¹⁴ However The Code Committee left itself an out by requiring a review of the amendments in September 2012.²¹⁵ The Committee's one year review returned positive reviews of the amendments.²¹⁶ The Committee admitted that it was difficult to assess if any potential offerors have been deterred by the amendments, however it does state that overall bid activity remained at a similar level the year after the amendments were enacted.²¹⁷ The Committee also noted that the year after the amendments saw none of the major concerns of the critics of the amendments come to fruition.²¹⁸ The general consensus of The Committee was that in the first year, the Amendments successfully curbed the problems of the "virtual bid" while not overly burdening bidding companies.²¹⁹

²¹¹ See *supra* Part II.B.

²¹² See *supra* Part II.B.

²¹³ It may help the target company to remain independent, and therefore the target company board to keep their jobs, because the target will not receive any bids at all. Or, it could help the target by allowing it to court a white knight topping bid with a company that the board prefers, even if that company will not offer a maximum bid.

²¹⁴ It can hurt the shareholders, as Professor Bebchuk's study showed, by diminishing the return to the shareholders because the target company remains independent. See *supra* note 167.

²¹⁵ See *Response Statement*, *supra* note 89, at 5.

²¹⁶ See *generally One Year Review*, *supra* note 99.

²¹⁷ *One Year Review*, *supra* note 99, at 5.

²¹⁸ For example, the Review noted that no instances of more well-prepared bidders "flushing out" less-prepared bidders were realized. *Id.* at 5-6. The Review also stated that there was a significant reduction in an "offer period" being commenced due to an untoward movement in share prices instead of because of a firm offer. *Id.* at 6.

²¹⁹ See *One Year Review*, *supra* note 99, at 5-10.

As The Committee said in its Response Statement, inducement fees as they were used in practice before the amendments may just as well have hurt the target shareholders by precluding any topping bids by competing bidders.²²⁰ The Committee states in their One Year Review that they generally consider the ban on deal protection measures a success.²²¹ By not making any earth shattering changes to the deal protections used in the United Kingdom,²²² and by allowing room to change any detrimental effects of this ban, The Code Committee has provided a very balanced approach to attempting to protect target shareholders through the deal protection ban.

The enhanced disclosure requirements should substantially help to provide target company shareholders with more crucial information about the acquiring company's financial outlook, its intentions, and its stakeholders. The acquiring company will also benefit from enhanced disclosures from the target company.²²³ These enhanced disclosures were strongly supported in the Response Statement,²²⁴ and for good reason. Enhanced disclosure and better information improves decision-making. Furthermore, The Committee reviewed the disclosure requirements in their one year review and found that they improved transparency in offers.²²⁵

An easy argument for an American commentator to make regarding the initial perceived imbalance favoring acquirers would be to simply advocate for a target company's board to be able to use defensive measures like in Delaware.²²⁶ However, economic studies show a trend that those very defensive measures can lead to

²²⁰ See *Response Statement*, *supra* note 89, at 39.

²²¹ *One Year Review*, *supra* note 99, at 10-13. The Committee also noted, though, that some bidders and targets still included some agreements that the Committee Executive considered in violation of the amendments. *Id.* at 11.

²²² Banning the deal protection measures is still only a decrease of 1% in the size of the inducement fees. See *supra* text accompanying note 113.

²²³ See *supra* Part II.D.

²²⁴ See *Response Statement*, *supra* note 89, at 68, 80.

²²⁵ *One Year Review*, *supra* note 99, at 15-17.

²²⁶ See *Patrone*, *supra* note 5 at 85.

significantly lower returns to the target shareholders.²²⁷ In light of these studies by prominent economists, it is hard to imagine that repealing the Board Neutrality Rule would not lead to occasional situations that harm shareholder investments significantly. The Takeover Panel should be applauded for remaining so steadfastly in support of the Board Neutrality Rule as it embodies the shareholder protection that is one of the main goals of The Code.²²⁸ Target shareholders can rest assured that the board of directors will typically be serving the shareholders' best interest and not their own. The target shareholders also should assume that they will get close to the maximum merited premium on their shares, and thus the best return on investment they could possibly receive in a given takeover scenario.

The economic studies generally support keeping the target board of directors neutral in a hostile takeover. But, The Code Committee had to address the merger arbitrageurs and their influence on bids in a measured fashion.²²⁹ The Committee achieved this in intelligent fashion by enacting the deadline rules and ultimately rejecting a proposal for more stringent regulation of "short-term" investors.²³⁰ The Committee originally proposed, but later rejected, a rule that would bar all investors who acquired shares in the target after an announcement started a waiting period, from voting on the merger or from tendering their shares.²³¹

This proposal would have been too draconian of an approach to regulating "short-term" investors. Law professors who have written about the problems of decoupled voting rights and economic interests in shares²³² never mention an instance where merger arbitrageurs bought target company shares only to severely harm the

²²⁷ See *supra* Part III.A (an average of 11.6% lower returns for shareholders whose boards of directors were using entrenching defensive mechanisms).

²²⁸ See *Takeover Code*, *supra* note 3, *Introduction*, ¶ 2(a) at A1.

²²⁹ See *Response Statement*, *supra* note 89, at 5.

²³⁰ *Consultation Paper*, *supra* note 4, at 20.

²³¹ *Id.*

²³² See generally Martin & Partnoy, *supra* note 179; Hu & Black *supra* note 179.

target company through tendering into a totally inadequate offer.²³³ Like Chancellor Chandler noted in *Air Products*, arbitrageurs have to buy their shares from long-term investors who must have felt content with the return on their investment.²³⁴ To take away that option would harm some target company long-term shareholders in contravention of the principles of The Code.

If The Code Committee were to limit the voting rights for “short-term” investors, there would likely be a noticeable decrease in arbitrage activity. This would mean fewer opportunities for established shareholders to sell their stock at the slight price increase that will result from the potential offer.²³⁵ Stripping some shareholders of the ability to gain from their investment to protect all of the shareholders does not align itself with The Code principles,²³⁶ and The Code Committee made the right decision by ultimately rejecting this proposal.

The Panel should not foreclose the proposed amendment to disenfranchise “short-term” investors in its entirety. If, and only if, during its mandatory annual review of the 2011 amendments, The Panel decides that the amendments are not adequately correcting the imbalance of power in favor of bidders, The Panel should consider enacting this amendment on a *limited* basis. Instead of eliminating the voting or acceptance rights of all investors who purchase target company stock after the announcement of a potential bid, The Panel should consider halving those “short-term” investors’ vote. This could allow for more voting power to remain with established shareholders, without reducing the value of the shares purchased after the announcement of a potential offer to the same extent those

²³³ See *supra* Part III.B.2.

²³⁴ See *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 109 n. 413 (citing *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 815 (Del. Ch. 2007)).

²³⁵ For example, if Company A’s stock is trading at \$20 per share, and Company B offers to buy all of the stock of Company A at \$30 per share, there will be an immediate price increase upwards towards that \$30 mark. It will not reach \$30 because there is the risk that the transaction will not happen, but the price increase does provide an immediate opportunity to profit from an investment by selling to a merger arbitrageur.

²³⁶ See *Takeover Code*, *supra* note 3, *Introduction*, Gen. Principles 1-6; *Takeover Code*, *supra* note 3, *Introduction*, ¶ 2(a) at A1.

shares would be devalued under a scheme of total disenfranchisement.

This potential variation on the proposed amendment could be further narrowed in scope by tying it to the Rule 8.3 disclosure requirements.²³⁷ Rule 8.3 requires that any person who is or becomes interested in 1% or more of the securities of any party to a transaction, either before the announcement or during the offer period, must disclose to the public their interest in any securities relevant to the transaction as well as the details of any short positions in any relevant securities to the transaction.²³⁸ If only those “short-term” investors who have both over 1% interest and short positions in opposing, relevant securities were to have their voting power halved, then many of the problems associated with decoupling economic interest and voting rights could be improved without overly burdening established shareholders who want to sell their shares to “short-term” investors. In other words, Rule 8.3 will make it known which shareholders hold significant interests on both sides of the transaction, and furthermore which have short positions which decouple their economic interests and voting interests. Investors in these situations will almost always be arbitrageurs. By halving the vote of those arbitrageurs with significant voting power, established shareholders will retain more power over the decision to accept the bid, but this will not entirely preclude those long-term investors who want to sell to arbitrageurs from doing so. This could result in a “best of both worlds” situation that optimizes both established shareholder protections and the liquidity of a company’s stock.

The Panel would have to undertake a consultation period and another study to determine the feasibility of such a narrowly tailored disenfranchisement amendment. It may not be possible to keep track of, or distinguish, all of the shareholders who may be affected by this variation of the proposed amendment, and so this proposed amendment variation may ultimately be deemed impossible to implement. However, The Panel should leave itself the option of

²³⁷ *Takeover Code*, *supra* note 3, Rule 8.3 at E21.

²³⁸ *Takeover Code*, *supra* note 3, Rule 8.3(a)-(b) at E21; *Takeover Code*, *supra* note 3, Rule 8, note 5(a)(ii) at E27.

exploring this possible amendment if the current amendments fail to live up to their goals.

In sum, the United Kingdom's 2011 Takeover Code amendments were almost spot-on in their repairs of target shareholder protections in hostile takeovers. The one year review has returned positive results. The review supports the amendments and conclude, that at least within the first year, the amendments have protected target shareholders but not overreached to the point of chilling the M&A market. The amendments as they were enacted will continue protect target companies and target shareholders who are under siege from a hostile bidder. The amendments will increase shareholder access to information and allow them to choose the best offer presented to them, or reject all offers, without being bear-hugged into submission during the "virtual bid" period. A potential incremental increase in shareholder protection may be able to be achieved by exploring the possibility of limiting, but not totally excluding, the voting rights of the few "short-term" investors who also have short positions in a security relevant to the transaction. Moreover, The Code Committee's commitment to the Board Neutrality Rule appears to be the strongest protection for established target company shareholders that the Takeover Code can provide.²³⁹ Lastly, The Code Committee was smart in not committing to an almost draconian measure that likely would have harmed target shareholders as much or more than it would have protected them. The measured response from The Panel may be remembered as a great stride forward in modern M&A practice. Only time will tell.

CONCLUSION

The Kraft takeover of Cadbury flared tempers around the United Kingdom. Although The Panel operated quickly, and in what could have been viewed as a reactionary manner, its response to the Kraft-Cadbury takeover will likely be remembered as a strong improvement in the United Kingdom's takeover regulation. The Announcing All Bidders requirement and the mandatory twenty-eight day "Put Up or Shut Up" deadline should do an excellent job of addressing the pre-amendment problems with the "virtual bid." The

²³⁹ See generally Part III.A.

inducement fee ban could allow target company shareholders more flexibility and freedom to entertain opposing or topping bids. The enhanced disclosure requirements will increase information and aid in the decision making of the shareholders as well as the companies involved in a transaction. These amendments are designed to tilt the balances of power back to a more equivalent position between acquiring companies and target companies in hostile takeovers. Furthermore, The Code Committee did not overreach when it adopted these amendments and thus the amendments will not act as too burdensome of a detriment to the mergers and acquisitions market. Therefore, the 2011 Takeover Code amendments will likely be successful in achieving their goals and protecting target shareholders to an optimal extent.